DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1084 *** CAPITAL CASE ***
Title: Charles L. Ryan, Director, Arizona Department of Corrections, Petitioner
v
Edward Harold Schad
Docketed: March 5, 2013
Linked with 12A857
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-99005)
Decision Date: February 26, 2013
Rehearing Denied: March 4, 2013

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 4 2013	Application (12A857) to vacate the stay of execution entered by the United States Court of Appeals for the Ninth Circuit, submitted to Justice Kennedy.
Mar 4 2013	Response to application from respondent Edward Harold Schad filed.
Mar 5 2013	Reply of applicant Charles L. Ryan, Director, Arizona Department of Corrections filed.
Mar 5 2013	Petition for a writ of certiorari filed. (Response due April 4, 2013)
Mar 5 2013	Appendix of Charles L. Ryan, Director, Arizona Department of Corrections filed.
Mar 5 2013	Supplemental response filed by respondent Edward Harold Schad.
Mar 5 2013	Application (12A857) referred to the Court.
Mar 5 2013	Application (12A857) denied by the Court. Justice Scalia and Justice Alito would grant the application to vacate the stay of execution.
Mar 27 2013	Order extending time to file response to petition to and including May 8, 2013.
May 8 2013	Brief of respondent Edward Harold Schad in opposition filed.
May 8 2013	Motion for leave to proceed in forma pauperis filed by respondent Edward Harold Schad.
May 20 2013	Reply of petitioner Charles L. Ryan, Director, Arizona Department of Corrections filed. (Distributed)
May 21 2013	DISTRIBUTED for Conference of June 6, 2013.
Jun 10 2013	DISTRIBUTED for Conference of June 13, 2013.
Jun 17 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 17 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 24 2013	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 24 2013	Petition GRANTED. Judgment REVERSED, and case REMANDED. Opinion per curiam. (Detached Opinion)

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12-1084

Supreme Court, U.S.
FILED
MAR 5 - 2013
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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,

Petitioner,

vs.

EDWARD HAROLD SCHAD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

The majority of the assigned Ninth Circuit panel (Judges Stephen Reinhardt and Mary Schroeder, Judge Susan Graber dissenting) reconsidered its pre-certiorari decision to deny Respondent Edward Schad's motion to vacate judgment and remand pursuant to *Martinez v. Ryan*, 139 S. Ct. 1309 (2012). It then reconsidered its prior denial and remanded to the district court to reconsider the evidence Schad produced in district court, even though the district court had already alternatively considered the evidence and found it did not establish a viable claim of ineffective assistance of counsel at sentencing. *See Schad v. Schriro*, 454 F. Supp. 2d 897, 940 (D. Ariz. 2006).

The Ninth Circuit denied the State's request for en banc review, although eight judges joined in a dissenting opinion, including the statement: The majority's stay of execution and remand order in Schad openly defies the Supreme Court's directive in this very case and takes our habeas jurisprudence down a road that has already been rejected." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 2.)

1. Does the majority panel opinion order conflict with *Bell v. Thompson*, 545 U.S. 794 (2005), by staying the issuance of the Ninth Circuit's mandate based on its reconsidering a motion it had already denied prior to certiorari review?

2. Does the order err by applying *Martinez* rather than *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), when the district court did not find a procedural default, but rather considered Schad's claim of ineffective assistance of counsel on the merits (that the state post-conviction court had denied on the merits), and alternatively considered the merits of the claim in the light of new evidence first presented in the federal habeas proceedings?

3. Does the order err by remanding to the district court to reconsider the new evidence that it had already considered?

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DECISIONS BELOW

The Ninth Circuit majority panel order (Judge Graber dissenting) granting reconsideration of the *Martinez* motion, granting relief, and remanding to the district court was filed on February 26, 2013. On March 1, 2013, the panel majority issued an order granting Schad's motion for a stay of execution. On March 4, the Ninth Circuit panel majority (Judge Graber dissenting) issued an order denying rehearing by the panel. That same day, the Ninth Circuit issued a separate order denying rehearing en banc. There were two dissenting opinions from that order: the first, authored by Judge Tallman, and joined by Chief Circuit Judge Kozinski, Judges O'Scannlain, Bybee, Callahan, Bea, M. Smith, and Ikuta; the second authored by Judge Callahan and joined by Chief Circuit Judge Kozinski, Judges O'Scannlain, Tallman, Bybee, and M. Smith.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1254(1); and United States Supreme Court Rule 10.

PROVISIONS INVOLVED, IF ANY

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

In the state post-conviction-relief (PCR) proceedings, Schad claimed that counsel at sentencing failed to present evidence "regarding physical and emotional abuse to which Schad was subjected as a child and teenager." (ER 345.) However, the state PCR court denied relief, finding that Schad had only shown that such evidence "might exist," and concluding: "Defendant is simply asking to go on a fishing expedition with *no* showing of what would be turned up that the court did not already know at sentencing time and how that might effect [sic] sentencing. The claim has no merit." (ER 144-145.)

Schad's federal habeas petition similarly raised an IAC-sentencing claim, which the district court summarily rejected:

> Petitioner has failed to show that the PCR court's denial of his claim of IAC at sentencing was an unreasonable application of federal law. The Court further finds, with respect to Petitioner's attempt to introduce factual information that was not presented to the state court, Petitioner was not diligent in developing

> these facts. See infra, pp. 82-84. Moreover, the Court finds that even if Petitioner had been diligent and the new materials were properly before the Court, Claim P is without merit.

Schad v. Schriro, 454 F.Supp.2d at 940. The district court found, regarding the reasonable application of *Strickland*

> Petitioner has not demonstrated that trial counsel's performance at sentencing was either deficient or prejudicial. Instead, the Court finds that trial counsel presented a strategically sound case in mitigation and that the information Petitioner now contends should have been presented is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination.

Id. at 941. The district court ruled that Schad had not established an IAC claim even with all of the new evidence he offered in the federal court. *Id.* at 941-944.

On appeal, the panel's second amended majority opinion affirmed the district court's rulings on all claims regarding the conviction, but remanded to the district court for an evidentiary hearing on whether Schad's PCR counsel had been diligent in presenting evidence to support the IAC claim. *Schad v. Ryan*, 606 F.3d 1022, 1032 & 1048 (9th Cir. 2010).

The State filed a petition for writ of certiorari in this Court. This Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of *Pinholster*. *Ryan v. Schad*, 131 S. Ct. 2092 (2011).

After further briefing and consideration regarding the application of *Pinholster*, the Ninth Circuit unanimously affirmed the district court's denial of the IAC claim in a third amended opinion. *See Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011) (*per curiam*). Schad filed a Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 139 S. Ct. 1309 (2012), which the Ninth Circuit summarily denied on July 27, 2012. (Ninth Circuit Docket Numbers 88, 91.)

After this Court denied Schad's petition for certiorari and motion for rehearing of his petition for certiorari, Schad filed with the Ninth Circuit an Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017. On February 1, 2013, the Ninth Circuit panel denied the motion, as such, but instead construed it as a motion to reconsider its prior denial of Schad's Motion to Vacate Judgment and Remand in light of *Martinez*.

On February 26, 2013, the panel issued an order granting the motion and remanding the matter to the district court. (Order, attached hereto.) Judge Graber dissented, stating she would have denied Schad's motion to stay the mandate because there was no reasonable likelihood that the Arizona courts would have come to a different conclusion if presented with

the new mitigating evidence first presented in federal court. (Order, J. Graber dissenting, at 17-19.)

On February 28, 2013, Schad filed a motion to stay the execution itself. The panel majority granted the motion to stay, with Judge Graber dissenting. The State has filed a separate application to vacate that stay. *Ryan v. Schad*, No. 12A857.

The State filed a petition for rehearing and petition for rehearing en banc with the Ninth Circuit, which denied both motions, with the dissents indicated above. 4, 2013.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit panel majority erred by reconsidering its denial of a motion it denied before this Court denied certiorari review. As succinctly stated by Judge Tallman's dissent from the denial of rehearing: "Bereft of any legally significant change of circumstances in the interim, the majority has now completely reversed its prior ruling and has again remanded the case to the Arizona district court for a second time, directing it to consider the "new" *Martinez* claim (which the majority now characterizes as procedurally defaulted), while back-handedly dispatching *Pinholster* in a mere footnote." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 2-3.) The Ninth Circuit also abused its discretion by: (1) finding for the first time in the habeas proceedings that the new evidence of mental health mitigation constituted a "new claim" of ineffective assistance of sentencing that was

procedurally defaulted and falls within the ambit of *Martinez* rather than *Pinholster*; (2) and by remanding to the district court to consider the new evidence, even though the district court had already analyzed the new evidence and reasonably found it did not present a claim of ineffective assistance at sentencing.

I. THE NINTH CIRCUIT HAS ABUSED ITS DISCRETION IN NOT ISSUING ITS MANDATE AND THEN GRANTING RELIEF ON THE BASIS OF A CLAIM IT PREVIOUSLY DENIED.

The Ninth Circuit has abused its discretion, under *Bell v. Thompson*, 545 U.S. 794 (2005), by not issuing its mandate after this Court denied Schad's petition for a writ of certiorari and subsequent motion for rehearing. As stated by Judge Tallaman's dissent: "Our mandate should have issued automatically following the Supreme Court's denial of Schad's petition for certiorari which rejected his *Martinez* argument. See Fed. R. App. P. 41; *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004)." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 8.)

In *Bell v. Thompson*, 545 U.S. 794 (2005), the State of Tennessee argued that Rule 41 of the Federal Rules of Appellate Procedure does not allow for a stay of the mandate following a denial of certiorari. 545 U.S. at 802. Although ruling for the State of Tennessee, this Court declined to rule on that argument and assumed *arguendo* that such a stay might be permitted under Rule 41. *Id.* at 803-804. This Court noted, however, that the denial of certiorari "*usually signals the end of litigation.*" 545 U.S. at 806.

It found that the Sixth Circuit had abused any discretion it had by withholding the mandate for months based on evidence that supported only an arguable constitutional claim, thereby failing to "accord an appropriate level of respect" to the State's judgment." *Id.*

In his response to the State's petition for rehearing and rehearing en banc, Schad attempted to distinguish *Bell* on its procedural facts, pointing out that Schad had sought a stay of the mandate. (Response to Petition for Rehearing at 11 fn. 4.) However, Thompson had also asked that circuit court to extend a stay of the mandate while this Court considered his petition for rehearing. *Thompson*, 545 U.S. at 800. This Court denied the petition for rehearing, but the court of appeals did not issue the mandate. *Id.* Tennessee sought an execution date, and the Tennessee Supreme Court set an execution date. *Id.* Unlike here, there were further proceedings in both state and federal courts related to whether Thompson was competent to be executed. *Id.* at 800-801. While Thompson's competency-to-be executed claim was still pending in federal district court, the Sixth Circuit issued an amended opinion remanding a claim for ineffective assistance at sentencing claim for consideration of mental health evidence that apparently had not been previously considered. *Id.* at 801.

Thus, although this case is less complicated procedurally than *Thompson*, it involves the same reconsideration by the circuit court of evidence supporting an IAC claim and remand to the district

court for consideration of that evidence. As in *Thompson*, the State reasonably assumed federal habeas review was final when this Court denied certiorari review.

The Ninth Circuit's reasoning for delaying issuing its mandate was its reconsideration of the *Martinez* motion that it had previously *denied* before this Court denied certiorari review and rehearing. This Court said in *Thompson*: "Indeed, in this case Thompson's petition for rehearing and suggestion for rehearing en banc pressed the same arguments that eventually were adopted by the Court of Appeals in its amended opinion." 545 U.S. at 806. As in *Thompson*, "the State could have assumed with good reason that the Court of Appeals was not impressed" with Schad's previous *Martinez* motion, especially when the Ninth Circuit panel summarily denied the previous motion. *See id.* at 806-807. Mere review of a previously denied claim is "not of such a character as to warrant the Court of Appeals' extraordinary departure from standard appellate procedures." *Id.* at 808-809. This Court concluded in *Thompson*: "Here a dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived to have been mistaken. A court's discretion under Rule 41 must be exercised, however, in a way that is consistent with the "'State's interest in the finality of convictions that have survived direct review within the state court system.'" *Id.* at 812-813 (quoting *Calderon v. Thompson*, 523 U.S. at 555).

In sum, the Ninth Circuit panel majority's reconsideration of an issue it previously rejected improperly treats this Court's certiorari review of the very same issue as an academic exercise. This Court should not countenance the circuit courts' "reconsideration" of issues this Court has already ruled on. As Judge Tallman wrote: "The majority's stay of execution and remand order in Schad openly defies the Supreme Court's directive in this very case and takes our habeas jurisprudence down a road that has already been rejected." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 2.)

II. THE NINTH CIRCUIT ABUSED ITS DISCRETION BY FINDING, FOR THE FIRST TIME, A PROCEDURAL DEFAULT ON THE IAC-SENTENCING CLAIM AND BY CONCLUDING THAT *MARTINEZ* CONTROLS RATHER THAN *PINHOLSTER*.

The Ninth Circuit panel majority abused its discretion by finding *sua sponte* a procedural default on the IAC-sentencing claim, on the theory that Schad had presented the district court with a "new" claim of IAC at sentencing for not presenting mental health evidence, a claim distinct from the claim adjudicated in the state courts, ineffective assistance of counsel at sentencing for not developing and presenting mitigation. The Ninth Circuit's order turns procedural default into a sword to be used against the State's interest, instead of being an affirmative defense to protect the State's interest in finality.

A. *Procedural default is an affirmative defense.*

The procedural default doctrine is an affirmative defense that the state is allowed to assert to protect its interests in the finality of state convictions. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the state is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter.").

AEDPA does not prevent the state from waiving the procedural default defense. *See Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). The procedural default doctrine is not a sword to be used against the State to further delay habeas proceedings. This Court has held that a federal court abuses its discretion by considering, *sua sponte*, an affirmative defense that has been deliberately waived by the state. *See Wood v. Milyard*, 132 S. Ct. 1826, 1830 (2012). Here the Ninth Circuit abused its discretion by "overrid[ing] a State's deliberate waiver" of an affirmative defense. *See id.* at 1834-35.

This case appears to be the first time the Ninth Circuit has found a procedural default when the district court did not find it. Previous *Martinez* remands have been ordered in some cases where the district court found procedural default of one or more claims. *See Runningeagle v. Ryan*, No. 07-99026 (9th Cir. Order, July 18, 2012); *Creech v. Hardison*, No. 10-99015 (9th Cir. Order, June 20, 2012); and *George Lopez v. Ryan*, No. 09-99028 (9th Cir Order, April 26, 2012). In this case, however, because there was a

state-court merits ruling in this case on the IAC-sentencing claim and the district court addressed the merits of the claim, this Court's decision in *Martinez* is simply not relevant. *See Brown v. Thaler*, 684 F.3d 482, 489 n.4 (5th Cir. 2012) (reliance on *Martinez* was unavailing when the Texas court considered the claim on the merits).

Moreover, the State has not asserted a procedural default defense on appeal. (State's Supplemental Ninth Circuit Answering Brief, at 37-72.) Whether or not the State asserted procedural default as a claim to the IAC-sentencing claim in earlier habeas proceedings is irrelevant because the district court rejected the claim on the merits, including the merits of the claim *with* the new evidence first presented in federal court.

B. ***It is not equitable to find a procedural default at this point.***

The Ninth Circuit's third amended opinion rejected the IAC-sentencing claim. After that motion was denied, this Court denied Schad's petition for certiorari and petition for rehearing. It is inequitable to send this case back to district court to allow Schad to attempt to establish cause for a procedural default that was not found to exist until the Ninth Circuit's recent panel majority order. *Cf. Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2012) (*per curiam*) (noting the inequity caused by delaying a *Martinez* claim when it could have been brought at any time after this Court granted certiorari review in *Martinez*).

C. *Pinholster still applies.*

Despite the clear applicability of *Pinholster*, the panel majority order relegates that opinion to a footnote and asserts it does not apply here because Schad presented a "new" claim of ineffective assistance of counsel at sentencing regarding developing and presenting mitigating evidence. (Order at 13, fn.3.) As Judge Tallman stated: "By failing to take this case en banc our court has unfortunately allowed the majority to stretch *Martinez* beyond its limited scope, and permitted Schad to bolster a previously exhausted Strickland claim with new federal habeas evidence in clear violation of *Pinholster*." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 1-2.) In other words, because the Ninth Circuit panel order *sua sponte* found a procedural default, *Pinholster* no longer applies. If this logic were followed, any habeas petitioner could avoid *Pinholster* and the deferential standard required under that case by presenting the federal habeas courts with different evidence in support of the same claim that was presented to the state courts.

"Pinholster and Schad's claims are, for all relevant purposes, factually indistinguishable." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 3.) In *Pinholster*, the state contended "that some of the evidence adduced in the federal evidentiary hearing *fundamentally changed* Pinholster's claim so as to render it effectively unadjudicated." 131 S. Ct. at 1402 n.11 (emphasis added). Pinholster argued that the additional evidence that had not been part of the

claim in state court "simply support[ed]" his alleged claim. *Id.* This Court rejected Pinholster's argument:

> We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, [citing the opinion], which *brings our analysis to an end.* Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, *we are precluded from considering it.*"

Id. (Emphasis added.)

In accordance with *Pinholster,* the additional factual allegations Schad presented to the district court are a nullity for purposes of federal review. The IAC-sentencing claim, without the additional factual allegations first presented in the federal district court, was decided on the merits in state court. The district court did not find that a "claim" was procedurally defaulted; therefore there is no reason for a "cause and prejudice" determination.

Schad has manufactured a procedural default by trying to split the ineffective assistance at sentencing claim into two claims involving different sorts of evidence. As Judge Tallman states: The majority

attempts to circumvent the Supreme Court's holding in *Pinholster* by conjuring up a "new" *Strickland* claim, based on additional evidence identified for the first time in federal habeas proceedings." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 4.) He then stated: "The problem with the majority's 'new claim' theory is that there is nothing new about Schad's current claim." (*Id.* at 4-5.) Schad simply describes the *Strickland* claim raised in post-conviction relief proceedings as "not properly developed" and the *Strickland* claim he currently advances as "completely developed." Reply Brief for Petitioner-Appellant at 7, *Schad v. Ryan*, No. 07-99005 (9th Cir. Jan. 11, 2013), ECF No. 100-1. In other words: "The ephemeral default declared is only in the mind of the panel majority." (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 6.)

A broad reading of the narrow holding in *Martinez* to justify a remand to district court would conflict with the holding in *Pinholster*. (Order Denying Petition for Rehearing En Banc, Judge Tallman dissenting, at 1, 6-7.) In *Martinez*, the problem that concerned this Court was the fact was no merits ruling on *trial counsel's effectiveness* in state court; that issue had been procedurally defaulted. Hence, there was no merits ruling for a federal court to review under § 2254(d). Here, because there was a state court ruling on the merits, followed by a district court review on the merits, *Martinez* simply is not relevant.

III. THE NINTH CIRCUIT ABUSED ITS DISCRETION BY ORDERING THE DISTRICT COURT TO DO WHAT IT HAD ALREADY DONE—CONSIDER WHETHER THE NEW EVIDENCE ESTABLISHED A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Even assuming *Martinez* applies, nothing would be achieved by sending the matter back to the district court to make an analysis and decision it has already made. *Martinez* allows a new claim to be considered despite the failure to present it to the state courts. Here, any deficiency in the performance of PCR counsel by not presenting mental health evidence in the PCR proceeding was cured by the district court considering the new evidence and still finding Schad had not established a claim of ineffective assistance of counsel at sentencing.

The majority panel order of February 26, 2013, attempts to explain why the panel majority thinks the district court analysis was unpersuasive. But it did not make that conclusion when Schad filed his previous *Martinez* motion, which the panel summarily and unanimously denied after briefing by the parties. There is nothing new since the prior rejection of the *Martinez* motion, except that this Court has denied certiorari review and rehearing. (Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 2-3.)

The district court discussed at some length why sentencing counsel's performance was not deficient. *Schad v. Schriro*, 454 F. Supp.2d at 940-943. It found:

"trial counsel presented a strategically sound case in mitigation." *Id.* at 941. It further noted: "At sentencing, counsel presented evidence intended to show Petitioner as a man whose character and capabilities would enable him to benefit society." *Id.* at 942. It concluded: "Trial counsel's performance cannot be considered deficient for failing to present these opposing versions of Petitioner—i.e., as both rehabilitated and exemplifying a number of personal strengths and virtues which could be used to benefit others, and as an unstable and disoriented individual incapable of completing a task."

The Ninth Circuit's third amended opinion detailed the significant evidence counsel presented at sentencing. *See Schad v. Ryan*, 671 F.3d 708, 718-720 (9th Cir. 2010). The Ninth Circuit has not explained why the mitigation case that sentencing counsel *actually presented* was unreasonable.

The district court further found "that the information [Schad] now contends should have been presented is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination." *Schad v. Schiro*, 454 F. Supp.2d at 941. It concluded: "Finally, while the Court notes that the new materials, particularly the affidavit of Dr. Stanislaw, offer a more elaborate explanation of the psychological effect of Petitioner's childhood experiences, this information is either cumulative or, as discussed above, contradictory to the portrait of Petitioner that trial counsel presented at sentencing." *Id.* at 944.

The new evidence that Schad had mental health issues would have undermined his theory at sentencing that he was a stable, model prisoner who could benefit from rehabilitation. Indeed, his continually being a model prisoner would have seemed improbable if he indeed had serious mental health issues. Thus, as the district court found, the new evidence would not have been particularly mitigating, in view of the aggravating circumstances. Moreover, sentencing counsel called a psychiatrist to testify at sentencing, who testified about Schad's mental condition. *See Schad v. Ryan*, 595 F.3d at 919. That Schad produced new mental health reports in federal habeas does not show ineffective assistance of counsel at sentencing. *See Earp v. Cullen*, 623 F.3d 1065, 1076 (9th Cir. 2010) ("The fact that Earp can now present a neuropsychologist who is willing to opine that he had organic brain damage at the time of his trial does not impact the ultimate determination of whether Earp's counsel insufficiently investigated that possibility.").

Judge Graber's dissent echoes this reasoning. Judge Graber found no reasonable likelihood that the Arizona courts would have come to a different result if they had been presented with the new evidence. (Order, J. Graber dissenting, at 17-18). Judge Graber noted that the Arizona courts had found two aggravating circumstances: pecuniary gain and a prior murder. (*Id.* at 18, n.5). This Court has recognized that a defendant having committed another murder is "the most powerful imaginable aggravating evidence." *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 391 (2009). Thus, "even if *Martinez* applied, Schad does not advance a substantial ineffective assistance of trial

counsel claim." (Order Denying Petition for Rehearing En Banc, J. Tallman dissenting, at 2-3.)

Ultimately, Schad fails to explain how a mitigation case alleging that Schad had serious mental issues would have been more mitigating than the evidence presented at sentencing that he was a man worth saving because he could be rehabilitated in view of his good conduct in prison. As this Court said in *Pinholster*: "The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems, . . .—is also by no means clearly mitigating, *as the jury might have concluded that Pinholster was simply beyond rehabilitation.*" 131 S. Ct. at 1410. Accordingly, there was no prejudice from any ineffective assistance by sentencing counsel. *See id.* at 1409-1410 ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict."); *Belmontes*, 130 S. Ct. at 386-90; *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) (holding that "the mitigating evidence he seeks to introduce would not have changed the result").

And, because the district court already considered the new evidence, there is no purpose in remanding to that court. There is no reason the district court should evaluate the new evidence any differently under *Martinez* than it did before many years ago.

Finally, as Judge Callahan states in her dissenting opinion from the Ninth Circuit order denying en banc review: "The panel majority's decision

here cavalierly disregards [the victims'] rights in favor of a twice-convicted murderer who had already had the benefit of 33 years of legal process." See Order Denying Petition for Rehearing En Banc, J. Callahan dissenting, at 2. This Court should not countenance further delay.

CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court to grant its petition for writ of certiorari and vacate the Ninth Circuit's majority panel opinion of February 26, 2013.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
FILED
MAR 5 - 2013
OFFICE OF THE CLERK

No. 12-1084

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,

Petitioner,

vs.

EDWARD HAROLD SCHAD,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

APPENDICES A-H TO

PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

FILED
FEB 26 2013
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,	No. 07-99005
Petitioner – Appellant	D.C. No. CV-9702577-PHX-ROS
v.	District of Arizona,
CHARLES L. RYAN, Arizona Department of Corrections,	Phoenix
Respondent – Appellee.	ORDER

Before: SCHROEDER, REINHARDT, and GRABER, Circuit Judges.

After the Supreme Court denied Schad's petition for certiorari and motion for rehearing of his petition for certiorari, Schad filed an Emergency Motion to Continue Stay of the Mandate Pending En Banc Proceedings in *Dickens v. Ryan*, No. 08-99017. On February 1, 2013, we denied the motion, as such, but

instead construed it as a motion to reconsider our prior denial of Schad's Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 139 S. Ct. 1309 (2012). We requested further briefing and have carefully considered the responses we received from both parties.

I.

Martinez "changed the landscape with respect to whether ineffective assistance of counsel may establish cause for procedural default." *Lopez v. Ryan*, 678 F.3d 1131, 1133 (9th Cir. 2012). This changed landscape has been the cause of much uncertainty in courts of appeals, including our own. Our court decided to take the issue presented in the case before us en banc in *Dickens v. Ryan*, No. 08-99017. *See* Respondent-Appellee's Motion for Panel Rehearing and Rehearing En Banc, *Dickens v. Ryan*, No. 08-99017 (9th Cir. Aug. 17, 2012), Dkt. 69 (noting the conflict between that case and our decision in Schad); Petitioner-Appellant's Response to Petition for Panel Rehearing and Rehearing En Banc, *Dickens v. Ryan*, No. 08-99017 (9th Cir. Sept. 13, 2012), Dkt. 72. In addition, at oral argument before an en banc court in *Detrich v. Ryan*, December, 2012, pursuant to a pending *Martinez* motion, the court ordered counsel to address the circumstances under which a remand under *Martinez* was warranted. Order, *Detrich v. Ryan*, No. 08-99001 (9th Cir. Dec. 7, 2012), Dkt. 159. We have reviewed the briefs regarding the motion to remand in that case as well, and listened to the oral argument.

In light of these developments, it has become

clear that Schad's case raises the same issues our court is currently considering en banc. Because Arizona has already scheduled Schad's execution, we cannot hold this case, as would be our normal practice, until en banc proceedings have concluded. Thus, we have determined that it is proper to reconsider the earlier order in which we stated only, without any explanation at all, that the motion is "denied." For the reasons set forth below, we remand to the district court to determine whether, under *Martinez*, Schad's post-conviction counsel was ineffective, whether Schad suffered prejudice as a result, and, if both questions are answered in the affirmative, the merits of Schad's underlying claim.

II.

In order to determine whether a remand to the district court is appropriate in this case, we assume, without deciding, that Schad must meet the heavy burden of satisfying the requirements for a stay of mandate after the Supreme Court has denied certiorari. *See Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) (explaining that because the mandate should otherwise issue automatically following the Supreme Court's denial of a petition for certiorari, the petitioner must meet not only the standard for a stay but also the threshold "requirement of exceptional circumstances"); *see also Stokley v. Ryan*, 705 F.3d 401 (9th Cir. 2012). For the reasons set forth below, we conclude that Schad has met that standard. For those same reasons and because "[u]ntil the mandate issues, a circuit court retains jurisdiction of the case and may modify or rescind its opinion," *Beardslee*, 393 F.3d at

901, we exercise our inherent authority to remand for the district court to consider Schad's claim under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citations omitted). We consider four factors before granting a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Leiva-Perez v. Holder, 640 F.3d 962, 964 (9th Cir. 2011) (per curiam) (quoting *Nken*, 556 U.S. at 434). "The first two factors of the traditional standards are the most critical." *Nken*, 556 U.S. at 434. Important here is whether Schad can meet the first factor—showing a likelihood of success on the merits. As *Leiva-Perez* notes, the "likely to succeed on the merits" factor "does not require the moving party to show that [its] ultimate success is probable," rather, at least in some types of cases, a showing that the party's "chance of success on the merits [is] better than negligible" will satisfy the "likely to succeed on the merits" factor. 640 F.3d at 697-98 (internal alterations omitted) (quoting *Nken*, 556 U.S. at 434).

As to the first *Leiva-Perez* factors, Schad raised his "new claim" of ineffectiveness of sentencing counsel for the first time before the district court by submitting newly discovered evidence of his "mental illness" as an adult. We did not review the claim on appeal because the district court found that Schad was not diligent in presenting the evidence of mental illness to the state court under § 2254(c)(2) and, therefore, excluded that evidence. *Schad v. Schriro*, 454 F. Sup. 2d 897, 955-956 (D. Ariz. 2006). We nonetheless concluded that "if [the new evidence] had been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigation factors present in this case." *Schad v. Ryan*, 595 F.3d 907, 923 (9th Cir. 2010), *vacated on other grounds by Ryan v. Schad*, 131 S. Ct. 2092 (2011). Because, under *Martinez*, Schad may be able to present that new evidence as part of a "new claim" for relief on federal habeas review, and we have already held that such evidence would result in some likelihood of a different sentence, we hold that his "chance of success on the merits is better than negligible," and, therefore, the first factor is met. *Leiva-Perez*, 640 F.3d at 964.

Two of the remaining three factors favor granting a remand. Schad will likely be executed in one week if we fail to do so, and consequently, stands to suffer the ultimate irreparable injury—loss of his life. The public interest in not executing a man who may have been denied his constitutional right to counsel during the penalty phase of his capital trial also favors granting the remand. One factor, however, weighs against a grant. Arizona will suffer an injury if we

grant the remand, because as a co-equal sovereign power it has a strong interest in punishing serious crimes and in the finality of its state court judgments. *Cf. Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (describing the important interest in finality of state court judgments that is jeopardized when a court of appeals recalls the mandate after issuance). In the end, however, we believe that in this case, the final factor is outweighed by the other there, all of which strongly favor the granting of the motion for a remand.

Next, the threshold requirement of "exceptional circumstances" for granting a "remand" following the Supreme Court's denial of Schad's petition for certiorari is met here. *Beardslee*, 393 F.3d at 901. The combination of several factors gives rise to exceptional circumstances in this case. First, as we have noted, the Supreme Court's decision in Martinez "changed the landscape with respect to whether ineffective assistance of counsel may establish cause for procedural default." That decision fundamentally altered the procedural posture of Schad's claim for ineffective assistance of sentencing counsel. *Lopez*, 678 F.3d at 1133. Second, in the history of Schad's case, we have already concluded that "if [the new evidence] had been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigation factors present in this case." *Schad*, 595 F.3d at 923 (subsequent history omitted). Third, the pending en banc consideration of the same questions raised by Schad favors a finding of exceptional circumstances, because Schad should not be executed merely because the en banc proceedings are lengthy.

Fourth, only today the Arizona Supreme Court denied Schad's request that it consider his ineffective assistance of counsel claims under *Martinez*.[1] Fifth, Schad's pending execution itself is an exceptional circumstance. *Beardslee*, 393 F.3d at 901. Finally, unlike a case in which we have already issued a reasoned decision, here, we issued only a one-line order denying Schad's request without any explanation whatsoever—a denial that left unanswered several serious legal questions.

In *Stokley*, we also required a showing of prejudice under the Brecht standard for "substantial and injurious effect" in order to meet the requirement of exceptional circumstances. 1705 F.3d at 401; *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). We have described the *Brecht* standard as being met if:

> One cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to

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[1] The Arizona Supreme Court's decision today in effect reiterated the Superior Court's reasoned decision rejecting Schad's claim. As the State advised us in its supplemental briefing, the Superior Court's decision (and now the Arizona Supreme Court's decision) "has no effect on this Court's [the Ninth Circuit's] review of this claim" because it decided the *Martinez* issue only under Arizona state law and it was not bound to follow *Martinez*. Respondents-Appellees' Supp. Br. at 18, Dkt. 103.

> support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). We conclude that the *Brecht* standard is met here.

The facts of Schad's case stnd in stark contrast to those of Stokley, in which the panel concluded that "Stokley cannot demonstrate actual prejudice because he has not shown that the error, if any, had a substantial and injurious impact on the verdict." *Stokley v. Ryan*, 705 F.3d 401 (9th Cir. 2012). Stokley presented a dramatically weak case for prejudice. In Stokley the state court found that there were *no* mitigating factors and that the three aggravating factors were particularly egregious—"the victims were minors," two 13-year-old girls, one of whom Stokley had raped before choking her to death; "Stokley committed multiple homicides; and he committed those crimes in an *especially heinous, cruel, or depraved manner*." *Stokley v. Ryan*, 659 F.3d 802, 804-05 (9th Cir. 2011) (emphasis added). The evidence that the trial court may have improperly ignored in *Stokley* went only to his "family history" and "his good behavior in jail during pre-trial incarceration." *Stokley*, 705 F.3d at *3. It was on the basis of these less than overwhelming unconsidered facts that the panel, in holding that the standard for "exceptional circumstances" had not been met, concluded that Stokley failed to meet the applicable prejudice

standard. *Id.*

In sharp contrast, Schad's case involved a single homicide of an adult male. The trial court found three aggravating factors, but none was particularly egregious; "previous conviction of an offense for which a sentence of life imprisonment was possible, previous conviction for a crime involving violence, and commission of the murder for pecuniary gain." *State v. Schad*, 163 Ariz. 411, 417 (1989). Most important, unlike in *Stokely*, the sentencing court did *not* find that Schad's crime was especially heinous, cruel, or depraved. Unlike *Stokely*, Schad's crime did not involve sexual abuse, let alone forcible sexual rape of two teenage girls. Also, unlike *Stokley*, Schad never confessed to the crime and all the evidence was circumstantial. *Schad v. Ryan*, 671 F.3d 708, 717 (9th Cir. 2011). Perhaps most important, Schad's new mitigating evidence, which was never presented to the state court, was exponentially stronger than that in *Stokley*, and likely would have affected the outcome. The evidence Schad would have presented in mitigation, had it not been for sentencing counsel's and post-conviction counsel's errors, would have demonstrated that Schad was suffering from "several major mental disorders" at the time of the crime, specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others. ER 540. As we have stated previously, these facts provided

> [t]he missing link [to] what in [Schad's] past could have prompted him to commit this aberrant violent act of intentionally

> killing Grove. Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery, and Schad was therefore sentenced to death.[2]

With the missing evidence before it, however, the sentence would well have concluded that due to his serious mental illnesses, Schad did not hear the same level of responsibility for the crime as would someone with normal mental functioning.

In sum, Stokley's aggravating factors were far greater than Schad's, and Schad's mitigating factors that were not before the sentencing court provided a far greater reason for not executing a capital defendant than did the insubstantial evidence not considered by Stokley's sentence. More important, we conclude that absent the ineffectiveness of sentencing counsel, the picture of Schad that would have been presented to the sentence would have been far different from the one that was. Because the aggravating factors in Schad's case were weak and the omitted evidence, which showed that he suffered from serious mental illnesses as an adult, would have mitigated his culpability for the crime, we "cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error." *Merolillo*, 663 F.3d at 454. This error in failing to investigate and present evidence of Schad's serious mental illnesses, therefore, "had substantial and injurious effect or influence in determining the

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[2] *Schad v. Ryan*, 581 F.3d 1019, 1034 (9thCir. 2009) (subsequent history omitted).

[sentence]," and Schad meets the standard for prejudice under *Brecht*. 507 U.S. at 623.

III.

Under *Martinez* a federal court can find "cause" to excuse the procedural default of a claim when petitioner can establish (1) that post-conviction counsel was ineffective, and (2) "that the underlying ineffective-assistance-at-trial claim is substantial." *Martinez v. Ryan*, 132 S. Ct. 1309, 1312 (2012). *Martinez* is not "an independent basis for overturning [a] conviction" but only an equitable rule that allows a federal habeas court to decide a claim, such as ineffective assistance of (sentencing) counsel, that would have been properly before the state post-conviction court, and thereafter before the federal habeas court, *but for* the ineffectiveness of post-conviction counsel. *Id.* We conclude that Schad's new factual allegations set forth a new or different claim that was procedurally defaulted and that is "substantial." We remand to the district court for further findings on the remaining issues.

Although the district court did not find that Schad's claim was procedurally defaulted, it was. A claim is procedurally defaulted "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman v. Thompson, 501 U.S. 722, 735 n. 1 (1991). Thus, if Schad's new claim was not exhausted, he has procedurally defaulted that claim because Arizona

prevents him from asserting a successive claim in stat court. *See Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002) (describing Arizona's procedural default rules). Our rules for exhaustion focus not only on the legal claim but also on the specific facts that support it. Thus, an ineffectiveness of counsel claim may be a "new claim," and therefore unexhausted, if the "specific facts" it asserts were not presented to the state court and they give rise to a claim that is "so clearly distinct from the claims . . already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim." *Valerio v. Crawford*, 306 F.3d 742, 768 (9th Cir. 2002) (quoting *Humphrey v. Cady*, 405 U.S. 504, 517 n. 18 (1972)). *Martinez* permits a federal court to hear an unexhausted, and, thus, procedurally defaulted, claim that was not presented to the state court due to postconviction counsel's ineffectiveness.[3]

Schad raised an ineffective assistance of sentencing counsel claim before the state court based on counsel's failure to investigate and present additional evidence regarding his tragic history of child abuse—a claim designed to elicit a "reasoned moral response" to Schad as a "uniquely individual human being." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal citations and alterations omitted). ER 333-37, 343-49. The factual allegations he raised before the district court, however, amounted to a new and different claim: a claim that his counsel failed to

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[3] *Cullen v. Pinholster*, which bars federal courts from considering evidence never presented to the state court does not apply to "new claims." 131 S. Ct. 1388, 1401 n. 10 (2011).

investigate and present evidence of his mental illness as an adult—evidence that would have afforded an explanation of why he committed the crimes of which he was convicted. ER 459. The evidence Schad submitted in support of the new claim included a psychological report that addresses his "several major mental disorders" including, among others, : "Bipolar Disorder; Major Depression; . . . Obsessive-Compulsive Disorder; Schizoaffective Disorder; . . Dissociative Disorders . . . ." ER 540.

Schad's new evidence constitutes a new claim that is "so clearly distinct from the claims . . . already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim." *Valerio*, 306 F.3d at 768 (quoting *Humphrey*, 405 U.S. at 517 n. 18). Because Schad did not present this claim in his original petition for post-conviction relief to the state court, it is procedurally defaulted.[4] If Schad meets the requirements of *Martinez*, however, he may well have established cause for that procedural default.

Martinez has two requirements in order to establish cause: (1) that post-conviction counsel was ineffective,

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[4] The district court did not treat Schad's claim as procedurally defaulted because it did not recognize that Schad was advancing a new claim. Although the district court analyzed Schad's claim, including the new evidence on the merits, we believe that its assessment was fundamentally flawed as a result of its mistaken belief that Schad's new evidence was merely cumulative. *Schad v. Schriro*, 454 F. Supp. 2d at 944. The district court should reconsider its prior analysis on remand, now that it is clear that Schad advances a new claim.

and (2) "that the underlying ineffective-assistance-at-trial claim is substantial." 132 S. Ct. at 1312. The second requirement, whether the "claim is a substantial one" may be met if the petitioner "demonstrate[s] that the claim has some merit." Id. at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue)). We conclude that Schad has shown that his claim is substantial because, as we previously held, "if [the new evidence] had been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigation factors present in this case." *Schad v. Ryan*, 595 F.3d at 923 (subsequent history omitted). In fact, his claim is more than substantial. As we stated in Part II, *supra*, Schad's counsel's failure to investigate and present evidence of his serious mental illnesses "had substantial and injurious effect or influence in determining the [sentence]." *Brecht*, 507 U.S. at 623.

Therefore, we remand to the district court for determination of the first requirement under Martinez, whether post-conviction counsel was ineffective. 132 S. Ct. at 1312. If so, cause has been established and the district court must then determine whether Schad has shown prejudice sufficient to excuse the procedural default. Id. at 1316. Should Schad meet these requirements, the district court must then consider the merits of his new or different claim—his claim of ineffective assistance of counsel based on sentencing counsel's failure to investigate and present mitigating evidence of his mental illnesses as an adult.

It is so ORDERED.

Schroeder, Circuit Judge, concurring:

I agree with the order remanding in light of *Martinez*. The issue is whether the district court can consider evidence of Schad's serious mental illness that was not presented in state court habeas proceedings due to claimed ineffective assistance of counsel. We held in 2009 that the district court should consider the evidence. Within the past two years, however, the Supreme Court has issued two decisions that point in different directions when applied to this case.

The first was *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). After it came down we amended our decision to state that the evidence could not be considered. We said "the Supreme Court has now ruled that when a state court has decided an issue on the merits, the federal courts may not consider additional evidence." *Schad v. Ryan*, 671 F. 3d 708, 722 (9th Cir. 2011).

Then the Supreme Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). It there held that in some circumstances failure of state habeas counsel to present similar mitigation evidence could establish cause excusing the procedural default of a state court ineffectiveness claim based on such evidence. *Id.* at 1320-21.

We have previously considered the nature of the evidence and concluded that had it been considered by the sentencing court it could well have affected the

result. We described the evidence as "much more powerful" than the "cursory discussion" that was presented at sentencing. *Schad v. Ryan*, 581 F.3d 1019, 1034 (9th Cir. 2009). In my view the requisite standard for prejudice has been met.

Whether this case presents a claim that should be treated the same as the claim in *Martinez* raises difficult questions, some of which may eventually be resolved by an en banc court. In the meantime, Schad's execution has been ordered, and his case deserves to be considered expeditiously, but thoughtfully.

GRBER, Circuit Judge, dissenting:

I would deny the motion to stay the mandate and, therefore, respectfully dissent.

In Stokley v. Ryan, No. 09-99004, 2012 WL 5883592, at *1 (9th Cir. Nov. 21, 2012) (order), our court considered whether an intervening change in the law constituted an exceptional circumstance that could justify staying the mandate after the Supreme Court's denial of certiorari. We held that exceptional circumstances did not exist because the petitioner could not show prejudice under the applicable standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993): "In light of the Arizona courts' consistent conclusion that leniency was inappropriate, there is no reasonable likelihood that, but for a failure to fully consider Stokley's family history or his good behavior in jail during pre-trial incarceration, the Arizona courts would have come to a different conclusion." Stokley,

2012 WL 5883592, at *3.

In my view, a prejudice analysis comes out similarly for Schad. See State v. Schad, 788 P.2d 1162, 1172 (Ariz. 1989) (concluding, after an independent review, that the mitigating circumstances were "insufficient to outweigh a single aggravating factor"[5]); State v. Schad, 633 P.2d 366, 383 (Ariz. 1981) (concluding that leniency was nost warranted). Although the original panel previously concluded that the additional mitigating evidence created "at least some likelihood of altering the sentencing court's evaluation of the aggravating and mitigating factors present in the case," Schad v. Ryan, 595 F.3d 907, 923 (9th Cir. 2010) (per curiam), that conclusion does not mean that Schad has established prejudice. Schad "must establish not merely that the [alleged] error created a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage, infecting the entire proceeding with constitutional error." Stokley, 2012 WL 5883592, at *1 (alterations in original) (internal quotation marks omitted). He cannot meet that standard, and the panel's earlier conclusion of "some likelihood" is insufficient to require us to find actual and substantial prejudice if applying the "law of the case" doctrine. Therefore, I vote to deny the motion and dissent from the order.

3141596

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[5] There were "at least" two aggravating factors. The defendant committed the murder for pecuniary gain, and he had a prior murder conviction. Schad, 788 P.2d at 1172.

APPENDIX B

FILED
March 1, 2013
MOLLY C. DWYER, CLERK
U.S. COURT OF
APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APAPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,	) No. 07-99005
Petitioner – Appellant,	) D.C.No. CV-9702577-PHX-ROS
v.	) District of Arizona
CHARLES L. RYAN, Arizona Department of Corrections,	) Phoenix) ORDER
Respondent – Appellee.	)

Before: SCHROEDER, REINHARDT and GRABER, Circuit Judges.

In view of the remand Order issued on February 26, 2013, and for the reasons stated therein, the motion for a stay of execution is GRANTED during the time of the district court's consideration of the *Martinez* remand and of any appeal therefrom. *See also Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983) ("[A] circuit court, where necessary to prevent the case

from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal.").

Judge Graber dissents.

3161794

APPENDIX C

FILED
March 4, 2013
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APAPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,	) No. 07-99005
Petitioner – Appellant,	)D.C. No. CV-9702577-PHX-ROS
v.	)District of Arizona
CHARLES L. RYAN, Arizona Department of Corrections,	)Phoenix) ORDER
Respondent – Appellee.	)

Before: SCHROEDER, REINHARDT and GRABER, Circuit Judges.

A majority of the panel has voted to deny the petition for panel rehearing.

Judge Graber would grant the petition

The petition for panel rehearing is DENIED.

APPENDIX D

FILED
MAR 04 2013
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APAPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,	)No. 07-99005
	)
Petitioner – Appellant,	)D.C. No. CV-9702577-PHX-ROS
v.	)District of Arizona
	)Phoenix
CHARLES L. RYAN, Arizona Department of Corrections,	) AMENDED ORDER
	)
Respondent – Appellee.	)

Before: THOMAS, Circuit Judge and Capital Case Coordinator

The full court has been advised of the petition for rehearing and rehearing en banc. Pursuant to the rules applicable to capital cases in which an execution date has been scheduled, a deadline was set by which any judge could request a vote on whether the panel's orders should be reheard en banc.

A judge requested a vote on whether to hear the

panel's orders en banc, and a vote was conducted. A majority of the active, non-recused judges eligible to vote on the en banc call voted against rehearing the panel's orders en banc. Therefore, the petition for rehearing en banc is DENIED. No further petitions for panel rehearing or rehearing en banc will be entertained. En banc proceedings with respect to the orders are concluded. The panel will issue a separate order concerning the petition for panel rehearing.

FILED
MAR 04 2013
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

Schad v. Ryan, No. 07-99005

Circuit Judge TALLMAN, with whom Chief Circuit Judge KOZINSKI and Circuit Judges O'SCANNLAIN, BYBEE, CALLAHAN, BEA, M. SMITH and IKUTA join, dissenting from the denial of rehearing en banc.

The majority's stay of execution and remand order in *Schad* openly defies the Supreme Court's directive in this very case and takes out habeas jurisprudence down a road that has already been rejected.[1] Judges Reinhardt and Schroeder, writing for a divided panel, fail to appropriately apply the substantive Supreme Court precedents in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Their order needlessly adds years of additional delay in carrying out the sentence imposed on a twice convicted murderer by willfully ignoring the Supreme Court's express guidance to apply *Pinholster* here and by refusing to interpret *Martinez*, 132 S. Ct. at 1315, narrowly as the Court has commanded. By failing to take this case en banc our court has unfortunately allowed the majority

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[1] Order, Schad v. Ryan, No. 07-99005 (9th Cir. Feb. 26, 2013), ECF No. 115 [hereinafter Majority Order]. Judge Graber dissented on the grounds that Schad could not establish prejudice for his previously exhausted ineffective assistance of counsel claim.

to stretch *Martinez* beyond its limited scope, and permitted Schad to bolster a previously exhausted *Strickland* claim with new federal habeas evidence in clear violation of *Pinholster*.

After the panel previously remanded this case to the district court for an evidentiary hearing, the Supreme Court vacated the panel's opinion, instructing it to apply *Pinholster*. *Ryan v. Schad*, 131 S. Ct. 2092, 2092 (2011). In response, the panel initially amended its opinion to apply *Pinholster*, correctly recognizing that AEDPA forecloses a federal court's ability to consider on the merits new facts not raised before a state court. *Schad v. Ryan*, 671 F.3d 708, 722 (9th Cir. 2011) (per curiam).

In 2012, Schad again sought review of his case by filing a Motion to Vacate and Remand in light of *Martinez*, and the same panel properly denied the motion. Order, Schad v. Ryan, No. 07-99005 (9th Cir. July 27, 2012), ECF No. 91. Schad then attempted to raise *Martinez* once more in a petition for certiorari, but the Supreme Court denied review, *Schad v Ryan*, 133 S. Ct. 432, 432 (2012), and he unsuccessfully argued the *Martinez* IAC claim again on his motion for rehearing. *Schad v. Ryan*, 133 S. Ct. 922, 922 (2013).[2]

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[2] In his petition for certiorari, which was filed the same day that the panel denied his Motion to Vacate and Remand, Schad relied on *Martinez* extensively and specifically invoked his motion before the panel raising the same arguments, noting that the panel had not yet "acted on the motion." Petition for Writ of Certiorari at i, iv, 14, Schad v. Ryan, 133 S. Ct. 432 (2012) (No. 12-5534), 2012 WL 6947825. In his reply brief, he again relied extensively on *Martinez* and noted that he had "presented the [*Martinez*] issue to the lower court who declined to consider it." Reply to Brief in

(Continued)

Bereft of any legally significant change of circumstances in the interim, the majority has now completely reversed its prior ruling and has again remanded the case to the Arizona district court for a second time, directing it to consider the "new" *Martinez* claim (which the majority now characterizes as procedurally defaulted), while back-handedly dispatching *Pinholster* in a mere footnote.

I

This panel should have stood by its original ruling; *Pinholster* properly applies to this case, and it bars Schad from introducing new mitigating evidence in federal court for a claim he has previously exhausted before the Arizona courts. In *Pinholster*, the Supreme Court held that if a petitioner's claim of ineffective assistance of trial counsel has been adjudicated in a state court proceeding, federal habeas review of that claim is restricted to the record that was before the state court. 131 S. Ct. at 1398—1401. As the Court there explained, "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.* at 1401 (alteration in original).

Pinholster and Schad's claims are, for all

(Continued)

Opposition to Petition for a Writ of Certiorari at 2-4, Schad v. Ryan, 133 S. Ct. 432 (2012) (No. 12-5534), 2012 WL 6947823. In his petition for rehearing, he once again asked the Court to "enter an order remanding these proceedings to the court below for further consideration in light of *Pinholster* . . . *Martinez v. Ryan* . . . and its progeny." Petition for Rehearing at 11, Schad v. Ryan, 133 S. Ct. 922 (2013) (No. 12-5534), 2012 WL 7006576.

relevant purposes, factually indistinguishable. Both filed petitions for post-conviction relief, arguing that their trial counsel rendered ineffective assistance of counsel by failing to investigate and present certain mitigating evidence at sentencing. *Shad*, 671 F.3d at 721; *Pinholster*, 131 S. Ct. at 1396. Then in federal habeas proceedings, both petitioners reasserted their initial claims of ineffective assistance of sentencing counsel, attempting to bolster them with additional facts. *Schad*, 671 F.3d at 721-22; *Pinholster*, 131 S. Ct. at 1396-97.

As in *Pinholster*, the legal basis for Schad's ineffective assistance of counsel claim is the same now as it was before the initial post-conviction state court, and merely improving the evidentiary support does not provide a basis for a federal court to overturn a state court's reasoned opinion. We were reversed in *Pinholster for* permitting the petitioner to do just that, and thus, we should have gone en banc in this case to correct the majority's failure to apply Supreme Court precedent and to vacate the unwarranted stay of execution.

II

The majority attempts to circumvent the Supreme Court's holding in *Pinholster* by conjuring up a "new" *Strickland* claim, based on additional evidence identified for the first time in federal habeas proceedings. The problem with the majority's "new claim" theory is that there is nothing new about Schad's current claim. It attacks the sufficiency of the sentencing investigation by trial counsel by alleging

she was ineffective in not doing enough to show that Schad was a sympathetic person due to his poor upbringing.

In state post-conviction relief proceedings, Schad argued that his trial counsel rendered ineffective assistance by failing to present certain mitigating evidence at sentencing describing the psychological and physical abuse Schad endured as a child. *See Schad*, 671 F.3d at 721. In federal habeas proceedings, Schad claimed that his trial counsel was ineffective for failing to present additional evidence of this abuse, including new declarations "discussing Schad's childhood and its effect on his mental health." *Id.*

At bottom, both claims are premised on trial counsel's failure to present mitigation evidence relating to the physical and psychological impact of the abuse suffered by Schad.[3] *Pinholster* could not be more clear on this point. Merely bolstering the evidentiary basis for the claim does not transform Schad's previously adjudicated *Strickland* claim into a novel claim not bound by *Pinholster* or the state court record. *See Pinholster* , 131 S. Ct. at 1401. The majority improperly concluded that Schad's "new factual allegations" transformed Schad's exhausted *Strickland* claim, adjudicated on the merits in state courts, into a

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[3] Schad's characterization of his former and current claim demonstrate their singular origin. Schad describes the *Strickland* claim raised in post-conviction relief proceedings as "not properly developed" and the *Strickland* claim he currently advances as "completely developed." Reply Brief for Petitioner-Appellant at 7, Schad v. Ryan, No. 07-99005 (9th Cir. Jan 11, 2013), ECF No. 100-1. Pinholster made the same argument regarding evidence of organic brain impairment to try to excuse his horrendous crime.

"new" and procedurally defaulted claim. Majority Order at 12.

III

After declaring that Schad has advanced a "new" and procedurally defaulted claim, the majority concluded that Schad may obtain review of his fully developed *Strickland* claim, complete with the new evidence identified in federal habeas proceedings. The majority relies on a tortured construction of the Supreme Court's opinion in *Martinez* to arrive at this astonishing conclusion.

The Court in *Martinez* held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, counsel in that proceeding was ineffective." *Martinez*, 132 S. Ct. at 1320. Purportedly applying this exception, the majority stayed Schad's execution date after concluding that Schad's claim of ineffective assistance of trial counsel was substantial. Majority Order at 15. The majority remanded to the district court for determination of whether Schad's post-conviction counsel was ineffective. *Id.*

The majority's reliance on *Martinez* is misguided and without basis. *Martinez* is not applicable here because the Arizona state court previously adjudicated Schad's *Strickland* claim on the merits, and the district court did not find Schad's claim to be procedurally defaulted. The majority's extraordinary efforts to unilaterally declare that Schad's current *Strickland*

claim is procedurally defaulted defy the 'Supreme Court's instructions to apply *Pinholster*, and amount to a transparent attempt to further delay Schad's execution date. Schad cannot rely on *Martinez* to obtain relief because there is no procedurally defaulted claim, and no need to establish either cause or prejudice The ephemeral default declared is only in the mind of the panel majority. This case is controlled by *Pinholster*, not *Martinez*.

Furthermore, even if Martinez applied, Schad does not advance a substantial ineffective assistance of trial counsel claim. *See* Majority Order at 17-18 (Graber, J., dissenting). After an independent review of all evidence Schad offered in federal habeas proceedings, the district court concluded that the new mitigation evidence was "either cumulative or . . . contradictory to the portrait of Petitioner that trial counsel presented at sentencing: and would not have altered the outcome. *Schad v. Schriro*, 454 F. Supp. 2d 897, 944 (D. Ariz. 2006).

As Judge Graber trenchantly concluded in her dissent, Schad cannot demonstrate prejudice under the applicable standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). To establish prejudice, Schad "must establish not merely that the [alleged error] . . . created a possibility of prejudice but that [it] worked to his actual and substantial disadvantage, infecting the entire proceeding with constitutional error." *Stokley v. Ryan*, 705 F.3d 401, 401 (9th Cir. 2012) (alterations in original) (internal quotation marks omitted). This case did not meet the threshold requirement of exceptional circumstances through either the lens of *Pinholster* or

the prejudice analysis articulated in *Stokley*. Majority Order at 17-18 (Graber, J., dissenting). Our mandate should have issued automatically following the Supreme Court's denial of Schad's petition for certiorari which rejected his Martinez argument. *See* Fed. R. App. P. 41; *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004). A *Martinez* remand now only postpones proceedings without any hope of altering the legitimate sentence imposed.

IV

If these continuing *Martinez* remands are routinely permitted, our circuit will have failed to faithfully apply the heightened standard of review mandated by AEDPA by permitting Schad and other capital defendants to pursue bolstered versions of their previously exhausted *Strickland* claims. The majority's order simply encourages state prisoners to evade *Pinholster* by adding one or more factual allegations when re-pleading an ineffective assistance of counsel claim in federal habeas proceedings. The finality of death penalty litigation will be frustrated if courts view these embellished exhausted claims to be "new claims" that were procedurally defaulted under *Martinez*, and endless remands and further rounds of appeals will follow.[4]

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[4] This was precisely the outcome predicted by Justices Scalia and Thomas in their Martinez dissent:

> "I guarantee that an assertion of ineffective assistance of trial counsel will be made in all capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel

(Continued)

The majority's order perversely incentivizes prisoners and their counsel to locate additional, even cumulative, evidence during federal habeas proceedings. Applying the majority's logic, this evidence may then be found to have fundamentally altered and transformed claims that were adjudicated during state post-conviction relief proceedings into new claims not bound by *Pinholster* or the state court record. Left unchecked, the majority's conclusion contravenes the Supreme Court's instructions that "[i]t would be contrary to [the] purpose [of AEDPA] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced for the first time in federal habeas court and reviewed by that court in the first instance effectively de novo." *Pinholster*, 131 S. Ct. at 1399.

The majority's decision to stay Schad's execution date and remand to the district court was erroneous. We should have reheard this case en banc and corrected this unsupported order before the Supreme Court, for a second time, admonishes us for not applying *Pinholster*.

I respectfully dissent.

(Continued)

was ineffective in failing to make that claim, has worked its way through the federal system."

132 S. Ct. at 1324 (Scalia, J., dissenting).

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MAR 04 2013
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CALLAHAN, Circuit Judge, joined by KOZINSKI, Chief Circuit Judge, and O'SCANNLAIN, TALLMAN, BYBEE, and M. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

On August 1, 1978, Lorimer Grove left his home in Bisbee, Arizona, driving his new Cadillac to visit his sister in Everett, Washington. *Schad v. Ryan*, 671 F.3d 708, 711 (9th Cir. 2011) (per curiam). He never made it out of the state. His body was found eight days later on the side of the road near Prescott. *Id.* Edward Schad had strangled him – reducing the circumference of his neck by four inches and breaking a bone in the process – and stolen his car, credit cards, and jewelry. *Id.* at 712. Schad murdered Grove while on parole after serving 9½ years for his role in the strangulation of another man, Clare Odell Mortensen, in Utah. See Judith Acree, *Judge Moves Schad Trial to Flagstaff*, The Courier, May 2, 1985, at 1A.

Schad was first convicted on October 5, 1979, and sentenced to death on December 27, 1979. *Schad v. Schriro*, 454 F. Supp. 2d 897, 904 (D. Ariz. 2006). Schad was convicted on retrial on June 27, 1985, and sentenced to death for a second time, by a second judge, on August 29, 1985. *Id.*; *Schad v. Arizona*, 111 S. Ct. 2491, 2491 (1991). Now, over 33 years after he was first convicted and after the Supreme Court denied Schad's petition for certiorari, the panel majority has "reconsidered" its own prior decision, likely giving

Schad another six years to live[1]

For the reasons discussed by Judge Tallman, the panel majority's legal basis is unsound and, as the district court already concluded, Schad's ineffective assistance claim is meritless. *See Schriro*, 454 F. Supp. 2d at 940-44. The sole point of this exercise was to buy Schad more time – the very thing he took from Lorimer Grove and Clare Odell Mortensen. Victims have rights too. The panel majority's decision here cavalierly disregards these rights in favor of a twice-convicted murderer who has already had the benefit of 33 years of legal process. I respectfully dissent.

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[1] Historically, it has taken capital habeas cases an average of 3.1 years to resolve in federal district court. Nancy J. King et al., *Executive Summary: Habeas Litigation in U.S. District Courts* 7 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf (last visited Mar. 4, 2013). In Arizona capital habeas cases, it has taken an average of 2.8 years from the date of the district court's decision until this court issues a decision, and it has generally taken another 0.7 years before the Supreme Court issued a decision on a petition for writ of certiorari. Peg Bortner & Andy Hall, *Summary of Death Sentence Process: Data Set I Research Report to Arizona Capital Case Commission* 30 (2001), *available at* https://www.azag.gov/ccc/final-report (last visited Mar. 4, 2013.)

APPENDIX E

FILED
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U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APAPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,	) No. 07-99005
	)
Petitioner – Appellant,	) D.C. No. CV-9702577-PHX-ROS
v.	) District of Arizona
	) Phoenix
CHARLES L. RYAN,* Arizona Department of Corrections,	) ORDER
	)
Respondent – Appellee.	)

Before: SCHROEDER, REINHARDT and GRABER,** Circuit Judges.

The petitioner-appellant's Motion to Vacate Judgement and Remand to the District Court is DENIED.

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* Charles L. Ryan is substituted for his predecessor Dora B. Schriro as Director of the Arizona Department of Corrections. *See* Fed. R. App. P. 43(c)(2).

** Judge Graber was drawn to replace Judge Rymer.

APPENDIX F

FOR PUBLICATION
UNITED STATES COURT OF APAPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,	) No. 07-99005
Petitioner – Appellant,	)D.C. No. CV-9702577-PHX-ROS
v.	)District of Arizona
	)Phoenix
CHARLES L. RYAN,* Arizona Department of Corrections,	) ORDER
Respondent – Appellee.	)

Appeal from the United States District Court
For the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
May 14, 2009—San Francisco, California

Filed September 11, 2009.
Amended January 12, 2010.
Second Amendment June 3, 2010.
Third Amendment November 10, 2011

Before: Mary M. Schroeder, Stephen Reinhardt and

*Charles L. Ryan is substituted for his predecessor Dora B. Schriro as Director of the Arizona Department of Corrections. See Fed. R. App. P. 43(c)(2).

Susan P Graber,** Circuit Judges.

Per Curiam Opinion

COUNSEL

Kelley J. Henry, Nashville, Tennessee, for the petitioner-appellant.

Jon G. Anderson, Phoenix, Arizona, for the respondent-appellee.

ORDER

The second amended opinion filed June 3, 2010 is hereby amended. The amended opinion is filed concurrently with this order.

Absent further order of the court, no further petitions for rehearing or rehearing en banc will be considered.

OPINION

PER CURIAM

I. Overview

Edward Harold Schad was convicted in Arizona state court in 1979 of the murder of Lorimer

**Judge Graber was drawn to replace Judge Rymer.

Grove, and sentenced to death. After his first conviction and sentence were reversed by the Arizona Supreme Court on collateral review, Schad was re-tried in 1985, and was again convicted of first-degree murder and sentenced to death. His direct appeal and state habeas proceedings from his second trial lasted for the next twelve years, and his federal habeas proceedings in district court for nine years after that. After the district court denied Schad's federal habeas petition on all grounds, he filed this appeal in 2007.

Schad's appeal raises seven principal contentions. Three pertain to his conviction and four to the imposition of the death sentence. The challenges to the conviction include a claim of a *Brady* violation in the state's failure to disclose impeachment material relating to the credibility of a prosecution witness; a claim of ineffective assistance during the guilt phase of trial; and a challenge to the sufficiency of the evidence in support of first-degree murder.

Schad's four challenges to the sentence include claims of ineffective assistance during the penalty phase, application of an unconstitutionally narrow standard for determining the admissibility of mitigating evidence, improper use of a prior conviction to establish two aggravating factors, and insufficiency of the evidence underlying a third aggravating factor.

With respect to the conviction, the important issue involves the state's admitted failure to produce letters written in 1979 by a detective and a prosecutor to assist the state's witness, Duncan, in an unrelated California prosecution. With respect to the sentence,

the key issue is whether the district court erred by denying the claim of ineffective assistance of counsel at the penalty phase without holding an evidentiary hearing to consider substantial additional mitigating evidence. The district court ruled Schad failed to exercise diligence in bringing the new evidence out during his state habeas proceedings, but it did so without appropriate consideration of the many reasons Schad offered for his inability to produce the mitigating evidence during the state proceedings.

We affirm the district court's denial of habeas relief for the conviction. With respect to sentencing, we conclude that the district court applied the wrong diligence standard to deny Schad an evidentiary hearing on his sentencing ineffectiveness claim. We vacate the district court's denial of habeas relief and remand for the court, using the correct diligence standard, to determine whether an evidentiary hearing is warranted on Schad's claim of ineffective assistance at the penalty phase of his trial for failure to present material mitigating evidence.

II. Facts and Procedural Background

This is a case with strong circumstantial evidence pointing to the defendant's guilt and to no one else's. The victim, Lorimer Grove, a 74-year-old resident of Bisbee, Arizona, was last seen on August 1, 1978, when he left Bisbee driving his new Cadillac, coupled to a trailer, to visit his sister in Everett, Washington. Grove may have been carrying up to $30,000 in cash.

On August 9, 1978, Grove's body was discovered in thick underbrush down a steep embankment off the shoulder of U.S. Highway 89, several miles south of Prescott, Arizona. The medical examiner determined that the cause of death was ligature strangulation accomplished by means of a sash-like cord, still knotted around the victim's neck. According to the medical examiner, Grove had been strangled using a significant amount of force, resulting in breaking of the hyoid bone in his neck and the reduction of his neck circumference by approximately four inches. The time of death was estimated to be four to seven days prior to discovery of the body.

No physical evidence at the crime scene implicated Schad in Grove's murder, and there was no evidence of a prior connection between the two men. There was, however, ample evidence establishing Schad's presence in Arizona at the time of the crime and his possession, after the date Grove was last seen, of Grove's property, including his Cadillac, credit cards and jewelry.

On August 3, 1978, two days after Grove left Bisbee, and six days before his body was discovered, an Arizona highway patrolman found an abandoned Ford Fairmont sedan alongside Highway 89, approximately 135 miles north of where Grove's body was discovered. The Ford was unlocked, except for the trunk, and its license plates were missing. A check of the Fairmont's VIN revealed that Schad had rented the car from a Ford dealership in Utah in December 1977, had failed to return it, and that the dealership had reported it as stolen.

According to Schad's girlfriend, Wilma Ehrhardt, she and Schad, along with Ehrhardt's children, had driven the car from Utah to New York, Florida, and Ohio between December 1977 and July 1978. In late July, Schad told Ehrhardt he was going to look for work and left Ohio with the Ford. Ehrhardt and the children remained in Ohio, but later returned to Utah.

When police impounded the Ford on August 3, 1978, they found in it, among other things, three Arizona newspapers dated July 31 and August 1, 1978, the days just before the estimated date of Grove's murder, as well as a special mirror device later identified by witnesses as an object Grove invented to help him couple his trailer to his Cadillac.

According to credit card records, on August 2, 1978, Schad began driving the Cadillac from Arizona eastward, using Grove's credit cards to make purchases in numerous cities along the way. On August 2, Schad used Grove's credit card to purchase gasoline in Benson, Arizona. On August 3, Schad used the card to purchase gas in Albuquerque, New Mexico. For approximately the next month, Schad continued traveling the country in the Cadillac and using Grove's credit card. Schad also used Grove's checkbook to forge a check to himself from Grove's account, which he cashed on August 7, 1978, in Des Moines, Iowa.

In New York state on September 3, 1978, Schad, still driving Grove's Cadillac, was stopped for speeding by a New York state highway trooper. Schad told the

trooper he was delivering the car to New York on behalf of a "rather elderly " man named Larry Grove. Schad could not produce the car's registration, and instead gave the trooper the registration for Grove's trailer. The trooper issued Schad a citation and let him go.

Schad then drove back across the country, reuniting with Ehrhardt in Salt Lake City, Utah, on September 7, 1978. A man who was living with Ehrhardt at the time, John Duncan, contacted Salt Lake City police the same day to report that Schad had told him the Cadillac was stolen. Schad was arrested in Salt Lake City on September 8.

After Schad's arrest, Salt Lake City police impounded and searched the Cadillac. From the Cadillac's title application, found in the car, the police learned that the vehicle belonged to Grove. Schad told police that he had obtained the Cadillac four weeks before in Norfolk, Virginia, after meeting "an elderly gentleman who was with a young girl" and who asked Schad to trade vehicles temporarily so that he and the girl would not be recognized. Schad also told the Utah police that he "was supposed to leave [the Cadillac] at the New York City port of entry at a later date for the man to pick up." Police found in the Cadillac's trunk a set of Utah license plates issued to Ehrhardt. Schad had previously installed these plates on the stolen Ford. He left the Cadillac's original plates on the car while he was driving it across the country.

After Schad's arrest, Ehrhardt went to the Salt Lake City jail and retrieved Schad's wallet. Duncan

then searched the wallet and found the credit card receipts and the New York traffic citation. He again contacted the Salt Lake City police. When Detective Halterman came to Ehrhardt's home to collect the wallet and the documents, Ehrhardt also handed over a diamond ring she said her daughter had found in the glove compartment of the Cadillac. Witnesses later identified the ring as belonging to Grove. Duncan also visited Schad in jail. Duncan testified that during the visit Schad talked about lying about his presence in Arizona at the time of the crime and destroying evidence of the crime.

On October 5, 1979, the jury found Schad guilty of first-degree murder, and the court sentenced Schad to death. The Arizona Supreme Court affirmed the conviction and death sentence. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366, 383 (Ariz. 1981). The United States Supreme Court denied Schad's petition for certiorari. *Schad v. Arizona*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). Schad then petitioned for habeas relief in the state courts and obtained a reversal of his conviction on the ground that the trial court improperly instructed the jury on the elements of felony murder. *State v. Schad*, 691 P.2d 710, 711-12 (Ariz. 1984).

In Schad's 1985 retrial, he was again convicted of first-degree murder on materially the same evidence, and sentenced to death. The Arizona Supreme Court again affirmed on direct appeal. *State v. Schad*, 788 P.2d 1162, 1174 (Ariz. 1989). The United States Supreme Court granted certiorari to resolve two questions: (1) whether a first-degree murder conviction

is unconstitutional when it does not require the jury to agree on whether the murder was premeditated murder or felony murder; and (2) whether capital defendants are entitled to jury instructions on all lesser included offenses. *Schad v. Arizona*, 501 U.S. 624 (1991). The Court answered both questions in the negative and affirmed the conviction and sentence. *Id.*

Schad again sought collateral review in state court. The trial court denied the state habeas petition after four years in which Schad's counsel sought repeated extensions to file his supplemental petition detailing his claims, particularly with respect to mitigating sentencing evidence. The Arizona Supreme Court denied review.

Schad filed his federal habeas petition in the District of Arizona in August 1998, raising nearly thirty claims. In a published opinion dated September 28, 2006, the district court denied habeas relief. *Schad v. Schriro*, 454 F.Supp.2d 897 (D. Ariz. 2006). With respect to the challenges to the conviction, the court ruled that the state's failure to disclose impeachment material had not resulted in prejudice, that counsel was not ineffective at the guilt phase, and that the evidence was sufficient to support the conviction. With respect to sentencing, the court denied Schad's request for an evidentiary hearing to present new mitigating evidence in support of his claim of ineffective assistance at the penalty phase, finding that Schad was not entitled to a hearing because he was not diligent in developing the evidence in question during state habeas proceedings. *Id.* at 955-56. The district court also said that the evidence presented in district

court did not render trial counsel's performance deficient because the evidence did not support the strategy of presenting the positive image that trial counsel had pursued at trial. *Id.* at 941-44. This appeal followed.

III. The Three Challenges to the Conviction

A. State's failure to disclose exculpatory material

[1] John Duncan, a principal witness for the state, had a lengthy criminal history. As part of its efforts to gain his cooperation in the first trial, in 1979, the prosecution promised to assist Duncan with a pending, unrelated California criminal proceeding. In impeaching Duncan's credibility, the defense was able to question him at length about his criminal record and the prosecution's promises of assistance, but the defense did not know that a prosecutor and detective in 1979 had actually written letters on Duncan's behalf to California authorities. Schad's most significant challenge to his conviction is the prosecution's failure to disclose these letters as impeachment material. Schad asserts that the state's actions violated his due process rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959).

The state has conceded that it should have disclosed the letters under *Brady*, so the *Brady* issue is whether Schad was prejudiced by the omission. We agree with the district court that the omission does not justify habeas relief because it resulted in little or no

prejudice, given the extensive impeachment material already available to the defense.

Duncan eventually testified in both trials that while Schad was being detained prior to trial in 1979, Duncan visited him to talk about the theft of the Cadillac, and Schad made several incriminating statements: he asked Duncan to destroy Grove's credit cards, and said that he "would deny being in any area of Arizona or the state of Arizona, particularly Tempe, Arizona and Prescott, Arizona."

In order to obtain Duncan's testimony and assistance with the Schad investigation, an investigative officer, Detective Halterman, had told Duncan he would write a letter to the judge presiding over Duncan's pending California criminal case. Moreover, the day before Duncan was set to testify at Schad's first trial in 1979, the prosecutor at that trial wrote to the California Community Release Board, stating that Duncan was "an extremely important witness for the State of Arizona" who had been "very cooperative" and "deserve [d] any consideration that can be given, including an early release, if possible." The prosecutor wrote a similar letter a few weeks later to the California judge presiding over Duncan's prosecution, stating that Duncan was "an important witness who was of material assistance to the prosecution" in Schad's case, and requesting that Duncan's "sentence be reviewed and if possible, his sentence be modified in light of his contribution to criminal justice."

Before the second trial in 1985, defense counsel

unsuccessfully moved to suppress Duncan's testimony. Duncan testified at that trial that Detective Halterman promised to write a letter on his behalf, but stated he did not know whether Halterman actually sent one. Halterman testified that he did offer to write a letter on Duncan's behalf, but stated he did not remember whether he actually sent a letter. Duncan further testified that he did not ask the prosecutor in Schad's first trial for any special treatment, although he did tell the prosecutor he knew of "people in the state prison that have been released early due to the fact of a state prisoner being a witness in a major or semi major crime." Duncan stated that he did not receive early release or any other lenient treatment in exchange for his testimony at Schad's first trial. At the close of the second trial, the prosecution still had not disclosed the letters so the defense could use them to impeach Duncan.

The defense was, however, able to impeach Duncan's credibility with other evidence of his lengthy criminal history, including the fact that he was currently serving a sentence for theft. Duncan admitted the advantages he asked for and some he obtained in exchange for his involvement in the Schad investigation. Detective Halterman stated on cross that although he could not remember whether he sent a letter to California authorities on Duncan's behalf, he recalled promising to do so, and "probably" did send a letter, further impeaching Duncan's credibility. Through this impeachment, the defense established Duncan had a motivation to testify falsely. The letters themselves would have provided some documentation of his motivation, but would not have provided a new

or further motivation.

It is not now disputed that the letters could have been used to impeach Duncan. The prosecution's duty to disclose material, potentially exculpatory evidence-including impeachment evidence-to a criminal defendant was established in *Brady*, 373 U.S. at 86. The state violates its obligations under *Brady*, and denies a criminal defendant due process of law, where the following three elements are met: (1) the evidence in question was favorable to the defendant, meaning that it had either exculpatory or impeachment value; (2) the state "willfully or inadvertently" suppressed the evidence; and (3) the defendant was prejudiced by the suppression. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

The sole dispute here concerns the question of prejudice. The state's failure to disclose the letters written on Duncan's behalf was prejudicial to Schad if "there [was] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citation omitted).

[2] We conclude the state's admitted failure to turn over the letters was not prejudicial. In the first place, the letters provided no independent basis for impeaching Duncan. We are less likely to find the withholding of impeachment material prejudicial in cases in which the undisclosed materials would not have provided the defense with a new and different form of impeachment. In *Barker v. Fleming*, 423 F.3d 1085 (9th Cir. 2005), for example, we held that the

prosecution's failure to disclose evidence of a witness's four prior convictions was not prejudicial because the undisclosed evidence was duplicative of impeachment already pursued at trial. We explained that the evidence would not have "provide[d] 'the defense with a new and different ground of impeachment.' " *Id.* at 1097 (quoting *Silva v. Brown*, 416 F.3d 980, 989 (9th Cir. 2005)).

We have also applied that test to grant relief where the undisclosed evidence would have provided a new basis for impeachment. In *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2005), we held that the prosecution's failure to disclose an immunity deal with its key witness did prejudice the defendant, where the impeachment pursued at trial went to the witness's criminal history and participation as a getaway driver in the defendant's offense. The undisclosed *Brady* information was that the key witness had received immunity for his testimony; this provided an independent motive for the witness to lie and would have made his critical, uncontroverted testimony less credible. *Id.* at 580. We held that the undisclosed promise of immunity was material, and therefore prejudicial, because it constituted "a wholly different kind of impeachment evidence" from the lines of impeachment pursued by the defense at trial. *Id.*

[3] This case is like *Barker*, where the undisclosed evidence related to the same motives to lie as evidence already known to and utilized by the defense. Here the jury knew that the prospect of obtaining assistance with the California case provided an incentive to lie. Moreover, Duncan was also

impeached by his extensive criminal record, apart from the California case.

In addition, in this case each of the three letters was written in connection with Duncan's assistance at Schad's first trial in 1979, so that the letters would have shed little light on Duncan's motivation to testify at the second trial six years later. Duncan had already enjoyed any benefit the letters prompted, and did not receive any further assistance for his testimony in 1985.

[4] Finally, and most important, the circumstantial evidence demonstrating Schad's guilt was powerful, and Schad did not offer any significant evidence to rebut the strong inference of guilt arising from that evidence. In light of the evidence against Schad, any additional impeachment value of the letters would not have changed the jury's verdict.

[5] Schad is not entitled to relief on his *Brady* claim because of the lack of prejudice resulting from the prosecution's failure to produce the actual letters written pursuant to a promise of assistance to Duncan that, along with the history of Duncan's other transgressions, was fully known to the defense.

In a related argument, Schad asserts that the state committed prosecutorial misconduct by permitting Duncan to testify falsely in 1985 that he did not receive any assistance from the state in exchange for his cooperation. Schad relies on *Napue*, 360 U.S. at 269, in which the Supreme Court held that the state violated a defendant's right to due process by doing

nothing to correct a witness's false testimony that he received no promise of consideration from the prosecutor in exchange for his cooperation.

To prevail on a *Napue* claim, a habeas petitioner must show that "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). Under *Napue*, false testimony is material, and therefore prejudicial, if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (citation omitted); *see also id.* at 978 ("[I]f it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.") (internal quotation marks and citation omitted).

[6] In this case, it is not entirely clear that Duncan lied. Although there is some indication in the record that Duncan may at some point have learned that Detective Halterman wrote a letter on his behalf, because the letter was referred to during a California proceeding in Duncan's case, it is not clear that Duncan remembered this letter in 1985 and thus lied on the stand. Even assuming he did, there is no evidence that the state knew or should have known that his testimony was false. Finally, the record before us does not reflect that the California authorities acted on Halterman's and the prosecutor's requests to benefit Duncan. Duncan's testimony that he received no assistance in his California case was not necessarily

false even if he knew and remembered the letter.

B. Ineffective assistance of counsel at the guilt phase

Schad argues that his trial counsel's failure to locate and present impeachment*1038 testimony from Duncan's ex-wife, Sharon Sprayberry, amounted to ineffective assistance of counsel. Schad contends Sprayberry's testimony would have impeached Duncan's statements about his jailhouse conversation with Schad in which, according to Duncan, Schad made statements about the need to destroy incriminating evidence and stated he would deny being in the area of Arizona where the murder took place. In an affidavit submitted with Schad's state habeas petition, Sprayberry attested that she was present during the conversation and that Schad "did not make any statements relating to a homicide in Arizona."

Ineffective assistance of counsel claims require a defendant to show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness," and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

[7] Regardless of whether Sprayberry may have provided evidence helpful to Schad's case, Schad does not attempt to establish counsel's performance was deficient. In his briefing on appeal, Schad concedes that defense counsel's efforts to locate Sprayberry were

"diligent and thorough." *Strickland* requires both deficient performance and prejudice to make out an ineffective assistance of counsel claim. *See id.* at 687. Schad's inability to show his counsel's efforts to obtain the evidence were deficient is fatal to his claim.

C. Sufficiency of the evidence

Schad's final conviction-related claim challenges the sufficiency of the evidence underlying his conviction for first-degree murder. In reviewing a sufficiency of the evidence challenge, we ask whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (original emphasis). Because the state habeas court did not address the merits of this claim, we review de novo whether sufficient evidence exists to support Schad's murder conviction. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir.2002).

[8] Circumstantial evidence and reasonable inferences drawn from it may properly form the basis of a conviction. *United States v. Jackson*, 72 F.3d 1370, 1381 (9th Cir. 1995). The circumstances of Grove's death, including the fact that the murder was accomplished by ligature strangulation, permitted the jury to infer that the killing was intentional and premeditated, as required under Arizona law. *See* Ariz. Rev. Stat. § 13-1105(A). Thus, the main issue at trial was the identity of Grove's killer. To establish that Schad murdered Grove, the state introduced evidence that one day after Grove was last seen alive, Schad

was in possession of Grove's property, including his vehicle, credit cards, and checkbook. Schad's description to New York authorities of Grove as an elderly man strengthened the inference that Schad had encountered Grove in person. Moreover, the state introduced evidence that would permit a rational jury to infer that Schad knew about Grove's death, including Schad's statement to Duncan that he would deny being near the scene of the crime, and request to Duncan to destroy Grove's credit cards. The evidence, taken as a whole, was sufficient to allow a rational jury to return a conviction for first-degree murder, and we therefore deny relief on this claim.

IV. Sentencing Claims

A. Introduction — The 1985 Sentencing Proceeding

Prior to the sentencing hearing before the trial court in 1985, Schad's counsel filed a 39-page sentencing memorandum that presented the following mitigating circumstances, which focused largely on his prison conduct following his original conviction in 1979: (1) Schad was a model prisoner; (2) Schad pursued higher education while in prison; (3) Schad had numerous stable friendships; (4) the trial court gave a felony-murder instruction at Schad's trial, meaning that Schad's conduct may have been less reprehensible than a premeditated murder; (5) Schad had a troubled childhood with abusive parents; (6) Schad was beaten and threatened while in prison in Utah for a prior conviction; (7) Schad showed potential for rehabilitation; (8) Schad had a stable character; (9)

Schad did not pose a risk of violent or dangerous behavior; (10) Schad made charitable contributions; (11) Schad did not drink or use drugs; and (12) Schad had an excellent employment record in Arizona prisons.

At the sentencing hearing, Shaw called fifteen witnesses, including correctional officers, friends, relatives and a psychiatrist. Nearly all of the testimony related to Schad's good reputation and behavior as an adult, and particularly his good behavior while in prison. A Utah prison official, John Powers, testified regarding Schad's personal development and conduct while he was incarcerated in Utah state prison after a prior offense. Powers stated that Schad "made some great strides" in the prison's group therapy program. He also testified that Schad was permitted to be near weapons while working on a renovation project because he "was an excellent security risk." Powers testified that, in general, Schad was a "model prisoner" while incarcerated in Utah, and that he recommended Schad's release because he felt Schad was not a danger to the community. One Arizona prison official, Frank Terry, testified that Schad was placed in a relatively low security prison block because he posed no disciplinary problems or security risks, and another official, Jerry McKeand, elaborated that Schad actually assisted with other prisoners' disciplinary issues by helping to "keep[ ] the cell block kind of in line."

Next, several of Schad's friends and relatives testified. Janet Bramwell, a friend and fellow member of Schad's church, the King of Glory Lutheran Church in Tempe, testified that Schad requested and received

instruction in the Lutheran faith while in prison, and was confirmed as a member of the church. Bramwell also testified that she, her husband, and other church members wrote letters to Schad, welcoming him into the congregation and telling him about themselves and their families. Bramwell stated that after she and her husband received a letter in return, they began visiting Schad in prison approximately once per month. Bramwell described Schad as "clean and well-groomed," "likeable," and a "very intelligent person, very talented," and stated that Schad opened up to her and her husband about his difficult childhood. Bramwell's husband, Frank Bramwell, confirmed her testimony and also described Schad's educational efforts while incarcerated, including earning such good grades in his college courses that he was named to the dean's list. Another friend and fellow church member, Herb Zerbst, testified regarding his friendship with Schad. Zerbst and his wife corresponded with Schad using both written letters and audio cassettes on which they recorded messages. Zerbst and his wife also visited Schad in prison until they moved to Illinois. Zerbst described Schad as friendly and caring, and described Schad's concern for the Zerbsts' safety during their long drive to Illinois. Zerbst also stated that Schad was creative and sent him and his wife gifts, including crocheted items and paintings.

Ronald Koplitz, the chaplain at Schad's prison, stated that Schad consulted him for religious guidance due to his fear of death. He testified that Schad stood out from other prisoners because he was likeable and genuine. Koplitz described Schad as "the kind of inmate you can like, and the kind of inmate that does

not play games or try to .... get extra favors by being in a religious program." He testified that despite Schad's troubled childhood, he believed Schad had a "stable personality," at least in a controlled prison setting.

The psychiatrist, Otto Bendheim, testified briefly regarding Schad's early background and mental condition. Bendheim stated that Schad "had a miserable childhood and ha[d] been delinquent since his teens" and that he "was a deprived youngster," but that despite his criminal history, Schad was "not a dangerous type," was "pleasant" and had "above average" intelligence, and Bendheim was not "a bit afraid for his own safety" when he met with Schad.

The pre-sentence report prepared by a probation officer included discussions of Schad's troubled childhood, favorable character reports from several of Schad's friends and Arizona prison officials, and Schad's good behavior and achievements in prison. The report described Schad's childhood as follows:

> The defendant reported a very stormy childhood, with his father being an alcoholic and abusing the defendant on a regular basis. The defendant stated that his father would beat him with his fist as discipline. The defendant reported that he tried to protect the family from his father's abuse by allowing his father to inflict beatings on him for anger towards other members of the family. The defendant always kept his problems to himself and to this day has not dealt with the feelings he has regarding his life.

> The defendant learned at an early age how to suppress his feelings, even to the point of refusing to display emotion when his father would abuse him. ... The defendant stated that at age seventeen he tried to commit his father to the VA Hospital for treatment. He stated that his father was out of control due to his alcoholism. When the officials came to pick up his father, the defendant's mother changed her mind and took sides with her husband. The defendant stated that when the officials left he experienced the worst beating of his life. The defendant described his decision to commit his father as the hardest thing he ever did in his life.
>
> The defendant stated that in addition to the abuse his father would never allow him to socialize with others; consequently, the defendant was a very shy, withdrawn adolescent.

At the sentencing hearing, defense counsel praised the presentence report's discussion, but did not present additional evidence regarding Schad's troubled childhood. Counsel did not, for example, present testimony or affidavits from Schad's relatives to provide first-hand descriptions of the abuse Schad suffered as a child, nor did counsel seek a comprehensive psychiatric evaluation to assess the negative effects of that abuse.

After the sentencing hearing, the court rendered a special verdict discussing the aggravating and

mitigating factors. First, the court took into account Schad's positive record since his arrest and incarceration. The court found that the most persuasive mitigating circumstance was the fact that Schad was "a model prisoner, a student and a religious man with many supportive friends since being incarcerated." The court observed that Schad was "helpful, charitable and appears to care for people," that he did not abuse drugs or alcohol or have any discipline problems, and that he took many college courses while in prison and earned good grades. The court said, however, that although Schad's "good, stable character" and "signs of rehabilitation" constituted a mitigating factor, this factor was "not particularly weighty of view of [Schad's] length of incarceration."

Next, the court noted Schad's "unfortunate childhood," but concluded it was not a "persuasive mitigating circumstance." The sentencing court determined that the mitigating circumstances presented by Shaw were insufficient "to overcome any one of the aggravating circumstances," and imposed a sentence of death. After conducting an independent review of the aggravating and mitigating evidence, the Arizona Supreme Court affirmed, concluding that the mitigating factors were "insufficient to outweigh a single aggravating factor." *Schad*, 788 P.2d at 1174.

The aggravating factors applied by the sentencing court related to a prior conviction and to the circumstances of the murder. The court relied on a 1968 Utah second-degree murder conviction to impose aggravating factors for having a prior conviction

punishable under Arizona law by a life sentence or by death, and for having a prior conviction of a crime of violence. The court also found that Grove's murder was committed for the purpose of pecuniary gain. On appeal, the Arizona Supreme Court affirmed the first and third of these aggravating factors, and declined to reach the issue of whether the violent crime aggravator was sufficient to support imposition of the death penalty. *Id.* at 1170.

B. The Protracted State Court Post-Conviction Proceedings

After Schad was sentenced to death, he initiated state post-conviction proceedings in 1991 in which he was represented by a new attorney. In Schad's preliminary state habeas petition, filed on December 16, 1991, he argued the sentencing court failed to give proper weight to mitigating evidence of his troubled family background, but he did not raise a claim of ineffective assistance of counsel. The state court ordered Schad to file a supplemental petition by February 18, 1992, and Schad's legal team requested and obtained seventeen successive extensions of that deadline. During that time, post-conviction counsel obtained appointment of an investigator to look into Schad's family history.

In January 1994, Schad was appointed a new post-conviction attorney. The court granted her request for further investigative services, as well as more than ten motions for an extension of the deadline to file Schad's supplemental state habeas petition. In March 1995, counsel obtained appointment of a mitigation

expert. The court denied counsel's request for disclosure of Schad's prison file and for contact visits to allow the mitigation expert to interview Schad.

After the court ruled that no additional extensions of time would be granted, counsel filed Schad's supplemental petition on October 19, 1995. The supplemental petition included a general claim that Schad's sentencing counsel was ineffective for failing to discover and present mitigating evidence regarding Schad's family background. Attached to the supplemental petition was an affidavit from the expert in which she stated that the presentence report used at Schad's sentencing hearing did not adequately address the extent of the abuse Schad had suffered as a child. The affidavit described the physical and psychological abuse inflicted by Schad's father, including beating Schad with a belt or fists, refusing to allow Schad's mother to show him any affection, and isolating Schad from other children. The expert recommended that a comprehensive psychological evaluation be performed, and stated that she could compile a thorough profile only through further interviews with Schad and his relatives.

The state habeas court denied the ineffective assistance claim in June 1996 without holding an evidentiary hearing. The court described Schad's request for a hearing as amounting to nothing more than a "fishing expedition." Schad filed a motion for rehearing along with another expert affidavit. That affidavit indicated that she had performed additional interviews with Schad and obtained more information about his life history, but did not describe the new

information or include any supporting affidavits or other documents. The trial court denied the motion for rehearing, and in 1997 the Arizona Supreme Court denied Schad's petition for review.

C. Federal Habeas Proceedings

By the start of federal habeas proceedings in 1998, Schad's counsel had obtained a great deal more information about his early and abusive childhood experiences. Schad asserted that he received ineffective assistance of counsel at the penalty phase of trial when his attorney, Shaw, failed to investigate and present mitigating evidence regarding Schad's troubled childhood, and instead relied on the brief discussion of Schad's childhood contained in the psychiatrist's testimony and in the presentence report. During proceedings before the district court, Schad sought an evidentiary hearing in order to present a significant amount of evidence regarding his abusive childhood, which he contends his sentencing counsel should have presented at the sentencing hearing.

The district court held that Schad was not entitled to an evidentiary hearing because he was not diligent in attempting to develop the evidence during his state habeas proceedings. The court denied Schad's ineffective assistance claim without holding an evidentiary hearing.

Schad sought to present mitigating evidence not submitted during sentencing or during his state post-conviction proceedings, including extensive mental health records of his mother, father, and brother, as

well as several declarations discussing Schad's childhood and its effect on his mental health. The first declaration, from psychologist Charles Sanislow, provided an extremely detailed discussion of the psychological impact of Schad's abusive childhood. The second declaration, from psychologist Leslie Lebowitz, discussed the mental health history of Schad's parents, including his mother's struggle with prescription drug addiction and his father's affliction with post-traumatic stress disorder due to spending eighteen months in a German POW camp during World War II. Declarations from Schad's mother and aunt provided details regarding Schad's father's severe alcoholism and the abuse he inflicted upon his family. The final declaration, from a paralegal employed by the office of the Federal Public Defender, described interviews with Schad's sister and aunt regarding Schad's childhood.

The district court held, however, that Schad was not entitled to expansion of the record or to an evidentiary hearing because he was not diligent in developing the proffered evidence in state court. The district court also held that even if the evidence were considered in federal court, the evidence did not show that sentencing counsel was deficient in failing to present it. The court ruled the strategy counsel pursued was competent and that the newly proffered evidence could not have affected the result.

D. Schad's Claims

1. Additional Mitigating Evidence

[9] The state habeas court ruled that Schad's

claim of ineffective assistance of counsel at sentencing lacked merit because he was unable to present any significant mitigating evidence. Although Schad sought to present such evidence in the district court, the Supreme Court has now ruled that when a state court has decided an issue on the merits, the federal courts may not consider additional evidence. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). It has vacated and remanded this case to us for reconsideration. *Ryan v. Schad*, 131 S. Ct. 2092 (2011). Accordingly the district court's denial of this claim must be affirmed.

2. State court's consideration of mitigating evidence

Schad not only seeks to rely on mitigating evidence not presented at trial, but also challenges the standard under which the state courts evaluated the mitigating evidence that was submitted. While he makes a strong argument that the state court was following the wrong standard in other cases, we cannot conclude that the state court actually applied a standard that was too narrow in this case.

Because the state habeas court denied this claim without addressing the merits, we review de novo whether the state courts violated Schad's constitutional rights by failing to consider and give effect to the mitigating evidence of Schad's childhood. *Pirtle*, 313 F.3d at 1167.

We begin with the Supreme Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). In *Lockett*, a plurality of the Court struck down an Ohio statute requiring mandatory imposition of the death penalty unless certain specified mitigating circumstances applied. 438 U.S. at 607-08. The Court held that a state's statutory scheme for capital sentencing must not preclude the sentencing court form considering any mitigating evidence offered by the defendant. *Id.* at 604.

[10] In *Eddings*, the Court extended *Lockett*, holding that an Oklahoma capital sentencer acted unconstitutionally by refusing to consider evidence of the defendant's abusive childhood. The court ruled that the state court constitutionally erred in holding that only evidence which specifically negated an offense element was relevant for mitigation purposes. 455 U.S. at 108-13. The Court explained that *Lockett*'s holding applies not only to state statutes that prevent a capital sentencing authority from considering all potentially mitigating circumstances, but also to the process by which a sentencing court conducts the sentencing proceedings: "Just as the State may not be statute preclude the sentence from considering any mitigating factor, neither may the sentence refuse to consider, as a matter of law, any relevant mitigating evidence." *Id.* at 113-14 (original emphasis).

Schad's principal contention in this case is that the state courts did not consider the evidence of his troubled childhood because they unconstitutionally required a "nexus" between his childhood abuse and

his commission of Grove's murder. Schad contends the state courts applied the same test the Supreme Court rejected in *Tennard v. Dretke*, 542 U.S. 274, 281 (2004).

In *Tennard*, a case involving a defendant's low mental acuity, the Court invalidated a Fifth Circuit test that rendered potential mitigating evidence of a mental condition relevant to a capital sentencing determination only if the defendant presented evidence that "the criminal act was attributable to" the mental condition. In *Smith v. Texas*, 543 U.S. 37, 45 (2004), the Court went further and rejected any "nexus test," explaining that the requirement to prove a "nexus" between mitigating evidence and the charged offense is "a test we never countenanced and now have unequivocally rejected." *Tennard* and *Smith* are retroactively applicable to the Arizona Supreme Court's 1989 decision in this case. *Smith*, 543 U.S. at 45; *see also Graham v. Collins*, 506 U.S. 461, 467 (1993).

Before *Tennard* was decided, Arizona courts recognized a nexus test, similar to that rejected in *Tennard*, to preclude consideration of evidence of childhood abuse unless the abuse bore a causal connection to the crime of conviction. *See, e.g., State v. Djerf*, 959 P.2d 1274, 1289 (1998) In *State v. Wallace*, 773 P.2d 983, 986 (1989), decided eight months before the Arizona Supreme Court's decision in this case, the Arizona Supreme Court said that "a difficult family background, in and of itself, is not a mitigating circumstance." *Id.* at 986.

After *Tennard*, however, the Arizona Supreme Court has clarified that the nexus test affects only the weight of mitigating evidence, not its admissibility. *See State v. Newell*, 132 P.3d 833, 849 (2006) ("We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence. But the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.") (citing *Tennard*, 542 U.S. at 287). The United States Supreme Court has said that the use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence. *Eddings*, 455 U.S. at 114-15.

In two recent published opinions, we granted habeas relief from Arizona murder convictions on the ground that a lower court used an unconstitutional nexus test. *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007). In *Styers*, we granted relief to a habeas petitioner whose evidence of post-traumatic stress disorder was expressly disregarded by the Arizona courts due to his failure to demonstrate a causal connection between the disorder and the crime. The Arizona Supreme Court had concluded that although evidence of post-traumatic stress disorder "could ..., in an appropriate case, constitute mitigation," it did not constitute mitigation in the instant case because " two doctors who examined defendant could not connect defendant's condition to his behavior at the time of the conspiracy and the murder." *Id.* at 1035 (quoting *State v. Styers*, 177 Ariz. 104, 865 P.2d 765, 777 (1993)). We

held that the court's imposition of a nexus requirement was contrary to the clearly established rule set forth in *Eddings*. *Id.*

In *Lambright,* we granted habeas relief after concluding that the district court improperly applied a preclusive nexus test and declined to consider mitigating evidence of the petitioner's post-traumatic stress disorder. We stated that the district court's approach was "fundamentally flawed" and that the court "misapplied" *Tennard* and *Eddings*. 490 F.3d at 1114-15. We explained that the court erred by refusing to consider the majority of Lambright's mitigating evidence solely on the ground that he failed to show a nexus between the mitigating evidence and the crime. *Id.*

[11] In both of those cases, however, it was clear from the record that the lower court had applied the unconstitutional nexus test and had excluded mitigation evidence. By contrast, in this case, there is no indication that the state courts applied a nexus test, either as a method of assessing the weight of the mitigating evidence, or as an unconstitutional screening mechanism to prevent consideration of any evidence. Rather, the record shows that the sentencing court did consider and weigh the value of the small amount of childhood mitigation evidence that was offered, stating that it was not "a persuasive mitigating circumstance in this case." The Arizona Supreme Court stated that it had conducted an independent review of the entire record regarding the aggravating and mitigating factors. *See Schad*, 788 P.2d at 1172. In short, it does not appear that the state

courts refused to consider any evidence Schad offered. They concluded, as *Eddings* allows them to do, that it did not outweigh the aggravating circumstances.

[12] Absent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Eddings*'s constitutional mandates. *See Bell v. Cone*, 543 U.S. 447, 455 (2005) ("Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation."). We must hold there was no constitutional error in the Arizona courts' consideration of the mitigating evidence of Schad's troubled childhood.

[13] Schad's two remaining contentions with respect to the state courts' consideration of the mitigating evidence are easily disposed of. First, Schad challenges the state courts' weighing of the aggravating and mitigating evidence. It is well-established, however, that state courts have the discretion to assess the appropriate weight of sentencing-related evidence. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."). It was well within the state courts' discretion to determine that the mitigating evidence presented in Schad's case did not outweigh the aggravating evidence.

[14] Next, Schad challenges the state courts' failure specifically to address each of the categories of mitigating evidence he presented at his sentencing

hearing. State courts imposing or reviewing capital sentences are not required to provide an exhaustive discussion of all the mitigating evidence presented, as long as it is clear from the record that they reviewed the evidence. *See Moormann v. Schriro*, 426 F.3d 1044, 1055 (9th Cir. 2005) ("[T]he trial court need not exhaustively analyze each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant.") (internal quotation marks and citation omitted). Moreover, where, as here, the sentencing court states that it has considered all the mitigating evidence offered, we may not second guess its actions. *See id.* ("This court may not engage in speculation as to whether the trial court actually considered all the mitigating evidence; we must rely on its statement that it did so.").

3. State courts' application of aggravating factors

Schad challenges the state courts' determinations regarding the aggravating circumstances present in his case. Most importantly, he challenges the sufficiency of the evidence underlying the pecuniary gain aggravating factor, the only aggravating factor connected to this crime. Schad contends that application of the aggravating factor was improper because there was insufficient evidence to prove robbery was a motive for Grove's murder.

Under Arizona law, "[a] court may find pecuniary gain as an aggravating factor if the expectation of pecuniary gain is a motive, cause, or

impetus for the murder and not merely a result of the murder." *State v. Hyde*, 921 P.2d 655, 683 (Ariz. 1996). In applying the pecuniary gain factor, the sentencing court in this case emphasized that the state had proved that Schad was in possession of Grove's credit cards and his vehicle within a day of the murder and immediately began using the vehicle and the cards, as well as his check book. Grove's vehicle was a new Cadillac, while Schad abandoned his stolen Ford. In affirming the application of the factor, the Arizona Supreme Court held that these facts constituted "strong circumstantial evidence that the purpose of the murder was pecuniary gain." *Schad*, 788 P.2d at 1171. We review this determination under AEDPA standards that require us to give a presumption of correctness to a state court's factual determinations. 28 U.S.C. § 2254(e)(1).

In essence, Schad's position is that without direct evidence of his guilt, no rational sentencer could have made any finding as to his motive. Schad's guilt, however, was established at the guilt phase through circumstantial evidence. There is nothing irrational about relying on circumstantial evidence to show motive. Nor was the application of the pecuniary motive factor arbitrary or capricious. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

[15] It is clear that the evidence presented at trial regarding Schad's acquisition and use of Grove's vehicle, credit cards and checkbook rationally supported the application of the pecuniary gain aggravating factor. After Grove's death, Schad was living off of Grove's credit cards and his bank account.

Indeed, like the district court, we find it difficult to imagine a non-pecuniary motive for the murder. *See Schad*, 454 F. Supp. 2d at 931 ("[D]espite Petitioner's argument that the evidence could lead to contradictory inferences, it is difficult to ascribe a motivation other than pecuniary gain to the offense against Mr. Grove, who was a complete stranger to Petitioner."). Accordingly, we uphold the validity of pecuniary gain as an aggravating factor.

The state courts concluded that, under state law, a single aggravating factor was sufficient to support imposition of the death penalty in this case. Because we conclude that the pecuniary gain factor was rationally supported by the evidence presented, and not arbitrarily imposed, we do not reach the challenges to other aggravating factors.

V. Conclusion

We affirm the district court's denial of habeas relief on all claims related to Schad's conviction and sentence.

AFFIRMED.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

Edward Harold Schad,	)	DEATH PENALTY
	)	CASE
Petitioner,	)	
v.	)	CV-97-2577-PHX
	)	ROS
Dora Schriro, et al.,[1]	)	
	)	**MEMORANDUM**
Respondents.	)	**OF DECISION**
	)	**AND ORDER**
	)	

Petitioner Edward Harold Schad filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (Dkt.1).[2] The Amended Petition raised twenty-eight claims, including numerous subclaims. (Dkt.27). In an Order dated May 8, 2000, the Court found that Claims C, D, E, F, G, I (in part), K, N (in part), P (in part), T, U (in part), X, Z,

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[1] Dora Schriro, Director of the Department of Corrections, is substituted pursuant to Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." refers to the documents in this Court's file. "M.E." refers to the minute entries of the state court; "ROA-PCR" refers to the state court record of the post-conviction proceedings (CR-96-629-PC); and "RT" refers to the reporter's transcripts of Petitioner's trials. This Court received a certified copy of the state court records from the Arizona Supreme Court. (See Dkt. 38.)

AA (in part), and BB were procedurally barred, and that Claims S, V, W, and Y were meritless. (Dkt.59.) The Court found that Claims A, B, H, I (in part), J, L, M, N (in part), O, P (in part), Q, R, U (in part), and AA (in part) were properly exhausted, and ordered Petitioner to file a memorandum regarding the merits of those claims. (Id.) Petitioner filed a merits brief. (Dkt.82.) Respondents filed an answering brief on the merits (Dkt.91), and Petitioner filed a reply (Dkt.98).

For the reasons set forth herein, the Court concludes that Petitioner is not entitled to habeas relief.

BACKGROUND

On December 14, 1978, Petitioner was indicted for first-degree murder. (ROA-PCR 2.) The Arizona Supreme Court summarized the facts of the crime as follows:

> On August 9, 1978, a badly decomposed body of an elderly male was found approximately nine miles south of Prescott, Arizona, adjacent to a roadway pull-off on U.S. Highway 89. The body was discovered after a highway department worker had detected the odor of decaying human flesh the previous day while driving past the pull-off. Although the worker and his coworker had stopped briefly to investigate the odor on August 8, the body was not actually discovered until the next day due to the fact that it was well concealed in the brush. After the corpse was discovered, the Yavapai

County Sheriff's Department and the County Medical Examiner observed a small rope tied around the victim's neck. It was later established that the cause of death was strangulation.

Because of the advanced state of decomposition, the body was not identified until October 11, 1978, when it was established that the deceased was Lorimer "Leroy" Grove, a 74-year-old Bisbee resident. Grove had last been seen on August 1, 1978, in Bisbee, Arizona. On that morning, Grove left Bisbee driving a new Cadillac, pulling a camper-trailer. His ultimate destination was Everett, Washington, where he had intended to visit his sister.

On August 3, 1978, a dark green Ford Fairmont was found abandoned 30 miles north of Flagstaff, Arizona, alongside U.S. Highway 89 by a Department of Public Safety Highway Patrolman. It was subsequently determined that the Fairmont had been rented by the defendant from a Ford dealership in Sandy, Utah, on December 31, 1977. Although the vehicle had been rented for the weekend, it was never returned and had been reported as stolen. The vehicle was turned over to the Coconio County Sheriff's Department and was impounded at a local towing yard. On September 12, 1978, two officers examined the vehicle in connection with an investigation of possible homicide charges against defendant. Several items belonging to the victim were

found in the Fairmont, including a mirror device which was identified as being similar to one used by the deceased to hook the trailer to the automobile by himself.

On September 3, 1978, defendant was stopped by a New York Highway Trooper, for speeding, while driving the victim's Cadillac. When the defendant could not produce a registration on the vehicle, the officer asked for an explanation. Defendant replied that it wasn't his car but that he was delivering it for a friend to an area five or ten miles from where the officer stopped him. Asked who was [sic] the friend was, defendant said he was an elderly gentleman by the name of Larry Grove.

Defendant was arrested in Salt Lake City, Utah, on September 8, 1978, for parole violation. Defendant had been on parole from the Utah State Penitentiary where he had been serving a sentence for second degree murder conviction. After defendant was arrested and taken into custody, the Cadillac was taken to the Salt Lake City Police Department impound lot where it was searched. Various personal items were found in the car which were identified as belonging to the victim.

State v. Schad, 129 Ariz. 557, 561-62, 633 P.2d 366, 370-71 (1981) (Schad I).

On October 5, 1979, a jury found Petitioner guilty of first-degree murder. (ROA-PCR 56). The trial court sentenced Petitioner to death. (M.E.12/27/79). The conviction and sentence were affirmed on direct appeal. Schad I, 129 Ariz. 557, 633 P.2d 366. Petitioner unsuccessfully sought certiorari review in the United States Supreme Court. Schad v. Arizona, 455 U.S. 983 (1982). Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, Petitioner filed a petition for post-conviction relief ("PCR"), which the trial court denied. Upon petition for review, however, the Arizona Supreme Court reversed the conviction and remanded the case for a new trial. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984) (Schad II).

Petitioner was retried, and on June 27, 1985, a jury again convicted him of first-degree murder. (ROA-PCR 196). On August 29, 1985, the trial court sentenced Petitioner to death. (M.E.8/29/85). Petitioner appealed, and the Arizona Supreme Court affirmed his conviction. State v. Schad, 163 Ariz. 411, 423, 788 P.2d 1162, 1174 (1989) (Schad III). Petitioner sought certiorari review in the United States Supreme Court. The Supreme Court granted certiorari and affirmed Petitioner's conviction and sentence.[3] Schad v. Arizona,

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[3] The Court granted certiorari to address two questions, both of which it answered in the negative: "whether a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional; and (2) whether the principle recognized in Beck v. Alabama, 447 U.S. 625 (1980), entitles a defendant to instructions on all offenses that are lesser than, and included within, a capital offense as charged." Schad v. Arizona, 501 U.S. 624, 627.

501 U.S. 624, 648 (1991). The Court also denied Petitioner's motion for rehearing. 501 U.S. 1277 (1991).

Petitioner sought post-conviction relief in the trial court by filing both a preliminary petition for post-conviction relief (ROA-PCR 245) and a supplemental statement of grounds for relief (ROA-PCR 319). The court found most of the claims contained in both the preliminary and the supplemental PCR precluded. (M.E.3/27/96.) The court reviewed the merits of the remaining claims and dismissed the petitions. (M.E.6/21/96.) The court also denied Petitioner's motion for rehearing. (M.E.7/24/96.) Petitioner filed a petition for review (ROA-PCR 347), which the Arizona Supreme Court denied without comment.

On December 16, 1997, Petitioner filed a Preliminary Petition for Writ of Habeas Corpus in this Court. (Dkt.1.) He filed his Amended Petition on August 3, 1998. (Dkt.27.)

LEGAL STANDARD FOR FEDERAL HABEAS RELIEF

Petitioner's claims are governed by the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Lindh v. Murphy, 521 U.S. 320, 336 (1997). For properly preserved claims "adjudicated on the merits" by a state court, the AEDPA established a more rigorous standard for habeas relief. See Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) (Miller-El I). As the Supreme Court has explained, the AEDPA's

"'highly deferential standard for evaluating state-court rulings' ... demands that state-court decisions be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam) (quoting Lindh, 521 U.S. at 333 n. 7).

As set forth in 28 U.S.C. § 2254(d), the AEDPA provides two avenues of habeas relief:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"The threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." Williams v. Taylor, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review.

"Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. Id. at 365, 120 S.Ct. 1495; see Musladin v. Lamarque, 427 F.3d 653, 655 (9th Cir.2005) ("AEDPA limits the source of clearly-established federal law to Supreme Court cases"); Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. Williams, 529 U.S. at 381. Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be of "persuasive value" in determining what law is clearly established and whether a state court applied that law unreasonably. Musladin, 427 F.3d at 655 (collecting cases); see Clark, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. Williams, 529 U.S. at 405-06; see Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct

legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Id. at 406; see Lambert v. Blodgett, 393 F.3d 943, 974 (9th Cir.2004).

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407. In order for a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." Id. at 409, 120 S.Ct. 1495; Visciotti, 537 U.S. at 25.

According to the "demanding but not insatiable" standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. Miller-El v. Dretke, 545 U.S. 231, ___, 125 S.Ct. 2317, 2325 (2005) (Miller-El II). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El I, 537 U.S. at 340.

In considering a challenge under 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see Rice v. Collins, 126 S.Ct. 969, 974 (2006); Miller-El II, 545 U.S. at ___, 125 S.Ct. at 2325. However, it is only the state court's factual findings, not its ultimate decision, that are subject to 2254(e)(1)'s presumption of correctness. As the Court noted in Miller-El I, "AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions." 537 U.S. at 341-42.

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000) (Delgado II). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. Himes, 336 F.3d at 853; Pirtle, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. Pirtle, 313 F.3d at 1167 (citing Delgado II, 223 F.3d at 981-82); see also Himes, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be

reviewed de novo, because in that circumstance "there is no state court decision on [the] issue to which to accord deference." Pirtle, 313 F.3d at 1167; see also Menendez v. Terhune, 422 F.3d 1012, 1025-26 (9th Cir. 2005); Nulph v. Cook, 333 F.3d 1052, 1056-57 (9th Cir. 2003).

DISCUSSION

Claim A: **Petitioner's Fifth and Sixth Amendment rights were violated by the prosecution's use of the testimony of John Duncan and by the failure to disclose impeachment material.**

Claim I: **The prosecution's failure to disclose impeachment materials regarding Duncan entitles Petitioner to a new trial.**

In Claim A, Petitioner alleges that prosecution witness John Duncan was acting as *907 a police agent when he obtained incriminating statements from Petitioner. (Dkt. 82 at 7-16.) Therefore, according to Petitioner, the statements he made to Duncan were obtained in violation of his rights under the Sixth and Fourteenth Amendments. (Id.) Petitioner also claims that his Fifth Amendment rights were violated by the State's failure to disclose letters written to California authorities on Duncan's behalf by a Utah detective and the prosecutor at Petitioner's first trial. (Id. at 16-22.) Claim I alleges that the prosecutor's misconduct in

failing to disclose the letters requires a new trial. (Id. at 36-38.)

1. Background.

In September 1978, John Duncan and his wife were temporarily residing with Wilma Ehrhardt, Petitioner's live-in girlfriend, in Sandy, Utah, a suburb of Salt lake City. Petitioner first met Duncan on the night of September 7, 1978, after Petitioner returned to Sandy driving a new 1978 Cadillac. (RT 6/21/85 at 746, 755.) According to Duncan, Petitioner told him that the Cadillac was stolen. (Id. at 818-20, 836.) On the morning of September 8, 1978, Duncan called Salt Lake City Detective Kenneth Halterman with information about the stolen Cadillac.[4] (Id. at 634, 819.) Officers staked out the Cadillac and later that morning arrested Petitioner when he entered the vehicle.[5] (Id. at 624-28.)

Later that day, Ehrhardt went to the jail and retrieved Petitioner's wallet. (Id. at 667, 846.) Duncan observed that the contents of the wallet included credit cards and receipts bearing the name Leroy Groves, as well as a traffic citation issued to Petitioner by a New

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[4] Duncan was familiar with Detective Halterman because Halterman had arrested him on a California fugitive warrant. Duncan had fought extradition and was eventually released by the Utah authorities. (RT 6/21/85 at 821.)

[5] In addition to being suspected of possessing a stolen vehicle, Petitioner was arrested for a parole violation relating to his 1968 conviction for second-degree murder. (RT 8/28/79 at 5.)

York State Trooper. (Id. at 823-24.) Duncan again contacted Detective Halterman and turned over the materials from Petitioner's wallet. (Id. at 640-41, 823.)

On September 9, 1978, Detective John Johnson interviewed Petitioner, who indicated that he came into possession of the Cadillac by swapping vehicles with an elderly man in Virginia. (Id. at 682-83.) Petitioner denied any knowledge of the stolen credit cards found in his wallet. (RT 6/21/85 at 684.) He then invoked his Miranda rights. (See RT 8/28/79 at 47.)

On September 11, 1978, Duncan visited Petitioner in jail. (RT 6/21/85 at 820.) According to Duncan, during their conversation Petitioner urged him to destroy the credit cards and receipts and stated that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona." (Id. at 825.)

At Petitioner's first trial, defense counsel sought to suppress Petitioner's statement to Duncan. The trial court held an evidentiary hearing and denied the motion. (M.E.9/26/79.) The Arizona Supreme Court rejected Petitioner's argument that admission of the statement violated his Sixth Amendment rights, finding that "[t]he police did not direct Duncan's activities nor did they pay Duncan for the information." Schad I, 129 Ariz. at 565-66, 633 P.2d at 374-75. The court observed that "[a]lthough Duncan wanted 'some help from the police' with regard to his California parole violation, this help did not amount to more than a promise from Detective Halterman that he would write a letter to Duncan's judge in California

relating Duncan's assistance in the investigation" and there "was obviously no 'quid pro quo' for Duncan's assistance." Id. The court further found that "there were no concerted actions on the part of the police aimed at priming Duncan as a witness against defendant at trial, as evidence[d] by the unwillingness of the authorities to deliberately elicit incriminating statements from defendant during the suggested jail visit." Id. The court concluded that, "Regardless of Duncan's motivations in aiding the police, we cannot say that the police 'actively entered into the picture' so as to give rise to an agency relationship." Id.

At Petitioner's second trial, Detective Halterman testified that he did not suggest the visit and that Duncan was not paid for his activities. (RT 6/21/85 at 671-72.) Defense counsel again sought to suppress Petitioner's statement to Duncan, and the court again held an evidentiary hearing. (Id. at 793-816.) Duncan testified that he had initiated contact with Detective Halterman and that the idea to speak with Petitioner was his, not Halterman's. (Id. at 807-11.) Duncan testified, however, that he believed that Halterman or another officer had made special arrangements for the visit to take place. (Id. at 803-04.) He testified that he initially chose to contact Detective Halterman because he had assisted Duncan in obtaining his release after Duncan was arrested pursuant to a fugitive warrant. Duncan also testified that, "at least 10 days after" the jail visit, Detective Halterman offered to write a letter on his behalf to a California judge. (Id. at 812.) Also testifying at the evidentiary hearing was Lieutenant Donald Judd, of the Coconino County Sheriff's Department, who stated that in telephone

conversations with Detective Halterman, Halterman had referred to Duncan as an "informant" or "confidential informant." (Id. at 794-95.) The trial court denied the motion to suppress. In his ruling, the judge rejected the argument that Duncan was actually a confidential informant, observing that, "The Halterman testimony was rather clear, was extremely clear and unequivocal relative to the witness Duncan's not being, term of art, a confidential informant" and that in referring to Duncan as an informant Lieutenant Judd had simply reported the phrase used by Halterman. (Id. at 815.) The judge also noted that Detective Halterman's involvement in Duncan's release occurred "long before the Schad case ever came to light and that the help that, minimal as it was, that he had either offered or perhaps even given to Mr. Duncan, occurred after Duncan, except for testifying, after his information, 10 days after the Schad case was over for Duncan." (Id.) The judge concluded: "It's abundantly clear to the court that Mr. Duncan was not an agent of the police and was not such a person as would be used by the police and such a person as would be required to give Miranda warnings to defendants." (Id. at 815-16.)

On direct appeal, the Arizona Supreme Court was unpersuaded by the "new evidence" presented at the second evidentiary hearing. The court explained:

> Halterman denied suggesting a visit with the defendant. In fact, Duncan testified it was his idea. The record is less clear on who arranged the visit. Duncan stated that he thought that Detective Halterman or someone from the police

> department arranged his visit. Nevertheless, the evidence established that the police did not tell Duncan to visit Schad or what questions he should ask. Furthermore, the homicide investigation had yet to focus on Schad because Detective Halterman did not learn that the owner of the Cadillac was dead until a month after Duncan's visit. Finally, Duncan's release pending extradition*909 was arranged prior to the Schad case coming to light for reasons separate and apart from Duncan's subsequent assistance in this case.
>
> It is unnecessary to review the relevant case law. We do not find the defendant's evidence any more compelling than the last time. The record supports the judge's ruling. We find no error in denying the defendant's motion to suppress.

Id. (citations omitted).

2. Sixth Amendment violation.

This Court must determine if, as alleged by Petitioner, the decision of the Arizona Supreme Court was contrary to or involved an unreasonable application of clearly established federal law. As discussed by the Arizona Supreme Court, id. at 414, 788 P.2d at 1165, and acknowledged by the parties, with respect to this aspect of Claim A applicable federal law includes that set forth by the United States Supreme Court in Massiah v. United States, 377 U.S. 201 (1964), and Maine v. Moulton, 474 U.S. 159 (1985), which hold that once a defendant's Sixth Amendment

right to counsel has attached, the government is forbidden from "deliberately eliciting" incriminating statements, and in United States v. Henry, 447 U.S. 264 (1980), which applies the principles of Massiah to information obtained by jailhouse informants.

As Respondents note, also applicable to this claim is the line of Supreme Court cases establishing the principle that the Sixth Amendment "right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing." United States v. Gouveia, 467 U.S. 180, 185 (1984) (citing Kirby v. Illinois, 406 U.S. 682, 688 (1972)); see Illinois v. Perkins, 496 U.S. 292, 299 (1990); Moran v. Burbine, 475 U.S. 412, 428-31 (1986); United States v. Hayes, 231 F.3d 663, 673 n. 4 (9th Cir. 2000) (collecting cases). This line of cases also stands for the proposition that the Sixth Amendment right to counsel is "offense specific," meaning that "a defendant's statements regarding offenses for which he has not been charged [a]re admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." Texas v. Cobb, 532 U.S. 162, 168 (2001) (citing McNeil v. Wisconsin, 501 U.S. 171, 175-76 (1991)); see United States v. Danielson, 325 F.3d 1054, 1066 (9th Cir. 2003); Clabourne v. Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995).

Based upon these principles, it is evident that Petitioner's Sixth Amendment right to counsel was not violated when Duncan spoke with him because formal proceedings against Petitioner had not yet been initiated. Petitioner was arrested on September 8,

1978, on a parole violation and suspicion of possessing a stolen car. The jailhouse conversation with Duncan occurred three days later. Mr. Grove's body was identified one month later, on October 11, 1978. Petitioner was indicted for first-degree murder on December 14, 1978.

In his reply, Petitioner argues that his right to counsel had attached because he was the "focus" of the murder investigation at the time of his conversation with Duncan. (Dkt. 98 at 19-20.) Even if true, this is of no significance. As the Ninth Circuit noted, simply being the target or the focus of an investigation is not sufficient to trigger a suspect's Sixth Amendment rights:

> In sum, the Supreme Court, this court, and every other circuit to consider a similar issue has adhered to the rule that adversary judicial proceedings are initiated "by way of formal charge, preliminary hearing, indictment, information, or arraignment." This is a clean and clear rule that is easy enough to follow: Initiating any of these specific proceedings "marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." We are loath to engraft some new, pre-indictment proceeding onto the rule, thereby making it no longer clean and clear-and outside the clear boundaries the Supreme Court has established.

Hayes, 231 F.3d at 675 (quoting Kirby, 406 U.S. at 690). Moreover, as the Supreme Court explained in Gouveia, "we have never held that the right to counsel attaches at the time of arrest." 467 U.S. at 190 (explaining that the right to counsel attaches at the initiation of adversary judicial proceedings because the Sixth Amendment right "exists to protect the accused during trial-type confrontations with the prosecutor").

The decision of the Arizona Supreme Court denying Petitioner's claim that his Sixth Amendment rights were violated by admission of Duncan's testimony was neither contrary to nor an unreasonable application of clearly established federal law. Petitioner is not entitled to relief on this aspect of Claim A.

3. Brady violation.

The prosecutor at Petitioner's first trial, Steven Jaynes, wrote two letters to California authorities on Duncan's behalf, one prior to Duncan's testimony and one at the end of the trial. (Dkt. 82, Ex's 9 and 10.) Petitioner alleges that his Fifth Amendment rights were violated by the failure of Jaynes, and of the prosecutor at the second trial, Frank Dawley, to disclose these letters, as well as a letter written on Duncan's behalf by Detective Halterman.[6] (Id. at 16-22, 36-38.) Respondents concede that prosecutors Jaynes

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[6] Claim I, asserting prosecutorial misconduct based upon this alleged discovery violation, is analytically from indistinguishable from this aspect of Claim A, and the Court will address the claims together.

and Dawley should have disclosed the letters, but contend that Petitioner was not prejudiced by the lack of disclosure. (Dkt. 91 at 25-26; see Dkt. 98, Ex. B.) As Petitioner notes, there is no state court decision addressing this aspect of Claim A, so this Court's review of the issue is de novo.[7]

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." The duty to disclose includes impeachment as well as exculpatory material. United States v. Bagley, 473 U.S. 667, 676 (1985).

The government violates its obligation under Brady where (1) the evidence in question was favorable to the accused, (2) the government willfully or inadvertently suppressed the evidence, and (3) prejudice resulted from the suppression (i.e., the evidence was "material"). Strickler v. Greene, 527 U.S. 263, 281-82 (1999); see Banks v. Dretke, 540 U.S. 668, 691 (2004); Kyles v. Whitley, 514 U.S. 419, 433 (1995). Evidence is material for Brady purposes "if there is a reasonable probability that, had the evidence been

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[7] As noted in this Court's procedural status order (Dkt. 59 at 8), Respondents conceded that Petitioner's Claim A had been properly exhausted (Dkt. 29 at 12). Claim A included the subclaim regarding discovery violations. (Dkt. 27 at 46.)

disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433 (quoting Bagley, 473 U.S. at 682); see Banks, 540 U.S. at 699; Strickler, 527 U.S. at 280.

With respect to the third prong of a Brady violation, the Supreme Court has explained that materiality does not require a showing that the defendant would have been acquitted had the suppressed evidence been disclosed. Id. at 434-35. Instead, a Brady violation occurs if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435.

In the instant case, the second prong of a Brady violation — suppression of the letters written on Duncan's behalf —— is not contested. The Court also finds, contrary to Respondents' position, that the first prong has been satisfied. The letters were favorable to the accused, in that they would have served as additional impeachment of Duncan's credibility. See Bagley, 473 U.S. at 683; Barker v. Fleming, 423 F.3d 1085, 1095 (9th Cir. 2005). The Court concludes, however, that Petitioner has not satisfied the third component of a Brady violation; he has not shown that disclosure of the letters would have "put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.

First, the case against Petitioner was based on circumstantial evidence linking him to Mr. Grove's murder. This evidence was independent of Duncan's testimony about Petitioner's statements, and its

validity would not have been affected by additional impeachment of Duncan's credibility. See Willhoite v. Vasquez, 921 F.2d 247, 249 (9th Cir. 2000) (while the witness's testimony was important, there was sufficient evidence apart from it "to carry the case to the jury") (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). Moreover, Duncan was not the principal witness against Petitioner, nor was his testimony "the glue that held the prosecution's case together." Horton v. Mayle, 408 F.3d 570, 579 (9th Cir. 2005) (suppressed impeachment evidence is more likely to violate Brady where a witness is central to the government's case). In Horton, for example, the Ninth Circuit reversed the denial of a habeas petition, holding that the state had violated Brady by failing to disclose a deal which would have provided immunity for the prosecution's star witness, who testified that the petitioner had confessed to robbing and murdering a drug dealer. Id. at 573, 579.

Also, as Respondents note, the impeachment value of the letters themselves was limited because they were written at the time of Petitioner's first trial and there was no evidence that Duncan was receiving benefits for his testimony at Petitioner's retrial six years later.

Finally, Duncan's credibility was significantly impeached during his testimony at the second trial. On direct examination, Duncan acknowledged that he was presently in jail on a petty theft charge and that his criminal record included a conviction for grand theft auto (RT 6/21 /85 at 818). He also acknowledged that he had contacted Detective Halterman about the stolen

Cadillac because Halterman had treated him favorably after arresting him as a fugitive. (Id. at 821-22). On cross-examination, defense counsel emphasized Duncan's criminal record (id. at 827-31), attacked his motives for assisting Detective Halterman (Id. at 832, 835), and noted that Duncan received a monetary reward from the bank for turning in the stolen credit cards (id. at 836-37). Counsel also examined Duncan about the letter Detective Halterman had promised to write on his behalf to the California authorities (id. at 837-39) and about Duncan's discussions with prosecutor Jaynes concerning the possibility that Jaynes could assist him with his charges in California in return for Duncan's testimony (id. at 856-57).

Given the nature of the impeachment to which Duncan was subjected during his testimony, any additional impeachment based upon the undisclosed letters would "merely duplicate the grounds for impeaching [Duncan] that were actually presented to the jury." Barker, 423 F.3d at 1096. The undisclosed information was not of a different character than the evidence that was presented, and did not "provide the defense with a new and different ground of impeachment." Id. (quotation omitted); see Silva v. Brown, 416 F.3d 980, 988 (9th Cir. 2005) (although the witness was impeached on the grounds of his plea deal, the prosecution's failure to disclose an agreement by which the witness was foreclosed from seeking a psychiatric examination was material for Brady purposes); Horton, 408 F.3d at 580 (although witness's testimony was impeached by evidence of drug use, lying to police, and assisting in the crime, withheld

evidence of promised immunity was a "wholly different kind of impeachment evidence").

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997), relied on by Petitioner for the proposition that the state violates Brady when it withholds cumulative impeachment evidence, is distinguishable. In Carriger, the state withheld the Department of Corrections file of its principal witness, Dunbar, whose testimony that Carriger had confessed to the murder was the centerpiece of a case with weak physical evidence. Id. at 465-66. Adding to the significance of Dunbar's credibility was the fact that Carriger's defense was that Dunbar had committed the murder. Id. at 465. Dunbar's file contained information revealing his "long history of lying to the police and blaming his crimes on others." Id. at 479. Although the prosecution acknowledged that Dunbar was testifying under a grant of immunity and had a criminal record for burglary, it repeatedly vouched for his credibility, and Dunbar himself offered testimony about his nonviolent and truthful character testimony that was emphatically contradicted by the information contained in the undisclosed file. Id. at 480-81. The Ninth Circuit rejected the argument that the undisclosed information was cumulative and not material, noting that the jury had not been presented with "evidence of [Dunbar's] long history of falsely blaming others for his misdeeds" or his violent tendencies. Id. at 481.

At Petitioner's trial, by contrast, Duncan was impeached with the same category of information contained in the letters the prosecutors failed to

disclose. Defense counsel elicited testimony from Duncan that Detective Halterman had offered to assist him with his legal situation in California (RT 6/21/85 at 832, 835) and that Duncan had sought similar aid from prosecutor Jaynes (Id. at 856-57). Counsel's access to the letters themselves would not have substantially altered the quality of the impeachment to which Duncan was subjected, nor would the additional impeachment evidence afforded by the letters have "put the whole case in ... a different light." Kyles, 514 U.S. at 435, 115 S.Ct. 1555. Accordingly, Petitioner is not entitled to relief on his claim that his due process rights under Brady were violated by the prosecution's failure to disclose the letters written on Duncan's behalf.

For the reasons set forth above, Petitioner is not entitled to habeas relief on Claim A or Claim I.

Claim B: **The prosecution failed to preserve potentially exculpatory evidence in violation of Petitioner's right to due process.**

Petitioner alleges that the state violated his due process right to a fair trial by failing to preserve and process various items of physical evidence found in the Ford and Cadillac and by failing to preserve items found near Mr. Grove's body.[8] (Dkt. 82 at 24-30.)

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[8] Petitioner alleges that in the following instances evidence was not properly processed or preserved. (Dkt. 82 at 23-28.) Neither the Ford driven by Petitioner nor Mr. Grove's Cadillac was searched for trace evidence, such as soil samples. (Continued)

Petitioner argues that as a result of the state's failure to conduct a competent and complete homicide investigation, he was denied access to "potentially exculpatory evidence." (Id. at 30.) According to Petitioner, the prejudicial effect of these investigative shortcomings was particularly egregious because the evidence against him was entirely circumstantial. (Id. at 22-24, 29).

1. State court ruling.

Prior to trial, defense counsel moved to dismiss the charges based upon the destruction of evidence. (ROA-PCR 168.) The trial court denied the motion. (M.E.6/14/85.) However, the court agreed to provide, over the State's objection, a so-called Willits instruction.[9] (RT 6/27/85 at 1341.)

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hairs, and fibers. Items found in the Ford, including women's clothing, cigarettes, and a pipe containing marijuana, were not processed or preserved, and the mirror device discovered in the vehicle's trunk was not fingerprinted. Beer cans and a V-A card found at the pullover below which Mr. Grove's body was located were not fingerprinted or preserved. No hair samples or fingernail scrapings were taken from Mr. Grove's body; no soil or fiber samples were taken from his clothes, and the clothing itself was destroyed. A set of keys found on Mr. Grove was returned to his estate. By the time of the second trial, items that had not been lost or destroyed – including, most significantly, the mirror – were no longer capable of rendering recoverable fingerprints.

[9] Pursuant to the holding in State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964), the trial court instructed the jury as follows: "If you find that the plaintiff, in this case the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality are in issue, you (Continued)

On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that the state's failure to process and preserve evidence constituted a violation of his right to a fair trial. Schad III, 163 Ariz. at 415-16, 788 P.2d at 1166-67. In its analysis, the court first cited California v. Trombetta, 467 U.S. 479 (1984), for the proposition that the state has a duty to preserve evidence material to a suspect's defense. Id. The court next explained that "a Willits instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced *or the state acted in bad faith*." Id. at 416, 788 P.2d at 1167 (emphasis added). Finally, the court held that the Willits instruction given by the trial court "adequately protected the defendant's rights." Id. The court contrasted Petitioner's trial with cases in which the destroyed items were the only evidence linking the defendant to the crime. Id. The court concluded by observing that Petitioner was not prejudiced by the destruction of evidence:

> [I]n the present case, the best that the defendant could hope for is that none of his fingerprints were on the mirror, clothing or other items. While this would have excluded the defendant from the set of persons whose prints were on these items, it would not have excluded the defendant from ever having handled any of

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may infer that the true fact is against their interest." (RT 6/27/85 at 1402.)

> these objects, nor would it have exonerated him of the alleged crime. The Willits instruction accomplished the most that the defendant could have proved that his prints were not on these items. We find that the defendant's rights were adequately protected.

Id.

2. Analysis.

The Due Process Clause of the Fourteenth Amendment imposes a duty on the state to preserve evidence that "might be expected to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488. Under the Trombetta standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. at 489, 104 S.Ct. 2528. To establish a due process violation when the government fails to preserve evidence that is only potentially exculpatory, the petitioner must demonstrate that the government acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988).

Contrary to Petitioner's argument, the evidence at issue does not meet the Trombetta standard of possessing an "exculpatory value that was apparent before it was destroyed." 467 U.S. at 489. While a number of the items were of evidentiary interest, there is no indication that they possessed exculpatory value or that such value was apparent before the items were

destroyed. See Youngblood, 488 U.S. at 56, n* (in child molestation case, the possibility that destroyed semen samples could have proved exculpatory "is not enough to satisfy the standard of materiality in Trombetta "). The presence, let alone the exculpatory value, of fingerprints on beer cans found at a heavily used pullover near Mr. Grove's body or on a device belonging to Mr. Grove but discovered in the locked trunk of a car used by Petitioner, or trace evidence on Mr. Grove's heavily deteriorated shirt, is a matter of pure speculation. Because such evidence clearly falls into the "potentially useful" category, the Youngblood standard applies, and Petitioner has the burden to "show bad faith on the part of the police." Id. at 58; see Mitchell v. Goldsmith, 878 F.2d 319, 322 (9th Cir. 1989) (failure to preserve evidence of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant, is not a denial of due process unless a criminal defendant can show bad faith).

As noted above, the Arizona Supreme Court held that the Willits instruction given by the trial court was adequate to vindicate Petitioner's right to a fair trial under Trombetta. Schad III, 163 Ariz. at 416, 788 P.2d at 1167. Implicit in that holding was a determination that the state did not act in bad faith. Id. This Court must determine whether that holding involved an unreasonable application of clearly established federal law.

Petitioner's only argument in support of his claim that the police acted in bad faith is his characterization of the investigation as substandard

for a homicide case. (Dkt. 82 at 28-29.) This characterization, if accurate, shows at most negligence, as opposed to bad faith, on the part on the investigators. Youngblood, 488 U.S. at 58; see Villafuerte v. Stewart, 111 F.3d 616, 625-26 (9th Cir. 1997) (per curiam) (officers' failure to test for fingerprints in certain areas and failure to perform tests on semen samples did not demonstrate bad faith). In addition, as the court noted in Villafuerte, the police do not have a "constitutional duty to perform all tests desired" by a suspect. 111 F.3d at 625 (citing Youngblood, 488 U.S. at 59).

Petitioner has not shown, or even alleged, that the police acted with "animus" or engaged in "a conscious effort to suppress exculpatory evidence." *Trombetta*, 467 U.S. at 488. The investigators' conduct bears no relationship, for example, to that described in Miller v. Vasquez, 868 F.2d 1116 (9th Cir. 1989). In Miller, the Ninth Circuit reversed the district court's denial of a habeas petition. The court found that the petitioner had presented a colorable claim that the investigating officer acted in bad faith when he failed to collect the rape victim's blood-stained jacket and failed to photograph scratches on the petitioner's arms. Id. at 1121. The record contained evidence that the officer acted in bad faith: he referred to the petitioner using "an extremely derogative expletive," lied about his knowledge of the bloody jacket, and tried to dissuade witnesses from testifying in the defendant's favor. Id. The Circuit remanded the matter to the district court for a determination of the petitioner's bad faith claim. Id.

By contrast, Petitioner here has failed to make any showing that the officers conducting the investigation acted in bad faith when they failed to perform certain tests or destroyed items of evidence. See, Gausvik v. Perez, 345 F.3d 813, 817 (9th Cir. 2003) (to demonstrate bad faith defendant must "put forward specific, nonconclusory allegations that establish improper motive"). Petitioner has failed to meet his burden under Youngblood.

The Arizona Supreme Court's finding that the police did not act in bad faith, and consequently that Petitioner's right to a fair trial was not violated, was not an unreasonable application of clearly established federal law as set forth in Trombetta and Youngblood. Petitioner is not entitled to relief on Claim B.

The Court further finds that Petitioner has failed to allege a colorable claim of bad faith sufficient to warrant an evidentiary hearing. See Miller, 868 F.2d at 1121.

Claim H: **The evidence produced at trial was not sufficient to sustain Petitioner's conviction.**

Petitioner contends that there was insufficient evidence to support his murder conviction. (Dkt. 82 at 30-36.) Petitioner argues that the State's case "was based on inferences drawn from circumstantial evidence" and that "no circumstantial evidence connected [Petitioner] to Mr. Grove's death." (Id. at 30.) Petitioner raised this claim in his preliminary PCR petition. (ROA-PCR 245 at 8-9.) The PCR court denied

the claim as procedurally precluded.[10] (M.E.3/27/96.) Because the state court did not address the merits of the claim, a de novo review is required. Pirtle v. Morgan, 313 F.3d at 1167.

There is sufficient evidence to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *916 any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). In making such a determination, a reviewing court is guided by a number of principles which reflect the doctrine that "deference [is] owed to the trier of fact." Wright v. West, 505 U.S. 277, 296 (1992). For example, "a federal habeas court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326. In addition, it is the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate

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[10] In its procedural status order of May 8, 2000, this Court found, with respect to Claims H, I (in part), N, O, P, and R, that the trial court's PCR order was based upon a finding that the claims were precluded pursuant to Rule 32.2(a)(2) of the Arizona Rules of Criminal Procedure, which precludes relief for claims that have been finally adjudicated on the merits on appeal or in collateral proceedings. (Dkt. 59 at 10.) Because claims precluded pursuant to this subsection have been properly exhausted, the Court decided that it would review the claims on the merits. (Id.)

facts." Jackson, 443 U.S. at 319; see Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir.1995). As the Ninth Circuit has explained, "The question is not whether we are personally convinced beyond a reasonable doubt. It is whether rational jurors could reach the conclusion that these jurors reached." Roehler v. Borg, 945 F.2d 303, 306 (9th Cir.1991) (citing Jackson, 443 U.S. at 326).

While "mere suspicion or speculation cannot be the basis for creation of logical inferences ... [c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir.1986); see United States v. Johnson, 804 F.2d 1078, 1083 (9th Cir. 1986) (the government is entitled to all reasonable inferences that may be drawn from the evidence). Moreover, "the government's evidence need not exclude every reasonable hypothesis consistent with innocence." United States v. Talbert, 710 F.2d 528, 530 (9th Cir. 1983) (per curiam); see United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991) ("The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict"); see Wright, 505 U.S. at 296-97; Jackson, 443 U.S. at 326.

The Court has reviewed the evidence presented at trial and concludes that it was sufficient to support Petitioner's convictions. As viewed in the light most favorable to the state, the following facts support Petitioner's murder conviction.

Leroy Grove, age 74, was last seen alive on August 1, 1978, in Bisbee, Arizona, as he was leaving

on a trip to Washington state to visit his sister. (See RT 6/19/85 at 340; RT 6/20/85 at 565-70.) The next day, August 2, 1978, Petitioner was driving Mr. Grove's Cadillac and using Mr. Grove's credit card to purchase gasoline in Benson, Arizona. (RT 6/25/85 at 924.) On August 3, 1978, Petitioner purchased gas with Mr. Grove's credit card at a station in New Mexico. (Id. at 923.)

Also on August 3, 1978, a Highway trooper discovered an abandoned vehicle, a Ford Fairmont, hidden behind some trees off of Highway 89, twenty miles north of Flagstaff, Arizona. (RT 6/20/95 at 454-55.) The Fairmont had been rented by Petitioner on December 31, 1977, from a dealership in Sandy, Utah, and was never returned. (RT 6/20/85 at 414-16.) The vehicle contained items belonging to the children of Petitioner's live-in girlfriend, Wilma Erhardt. (RT 6/21/85 at 784.) The vehicle also contained newspapers from Phoenix and Mesa dated July 31 and August 1, 1978, indicating that it had not been abandoned prior to the date on which Mr. Grove began his travels. (RT 6/25/85 at 971-72.) In the locked trunk of the vehicle officers located a mirror designed by and belonging to Mr. Grove. (See RT 6/19/85 at 342-43; 6/20/95 at 443-44, 495-96, 573; 6/25/85 at 889.) Petitioner had removed the Ford's dealer plates and replaced them with Utah plates from Erhardt's vehicle. (RT 6/21/85 at 784-85.) The Utah plates were later found in the trunk of Mr. Grove's Cadillac. (RT 6/25/85 at 963.)

On August 8, 1978, a highway worker detected an odor of decomposition emanating from the area of a roadside pullover on Highway 89 approximately eleven

or twelve miles south of Prescott. (RT 6/19/85 at 287-88.) The worker discovered Mr. Grove's corpse the next day. (Id.) It was located beneath some brush on an embankment approximately fifteen feet below the edge of the pullover. (Id. at 302; RT 6/25/85 at 958-59.) The hands were at the side of the body and the feet were crossed. (RT 6/20/85 at 382.) A ligature measuring ten and one half inches had been tied around the neck; the circumference of the average male neck is at least fourteen inches. (Id. at 373.) Mr. Grove had been strangled to death; the hyoid bone in his neck was fractured. (RT 6/19/85 at 361-62.) The cause of death was homicide. (Id. at 363.) The state of decomposition indicated that the body had been there for at least four days and possibly as long as a week. (RT 6/20/85 at 375.)

On September 3, 1978, Petitioner was stopped for speeding by a trooper in upstate New York; he was driving Mr. Grove's Cadillac. (RT 6/20/85 at 551-56.) Petitioner told the trooper that he was driving the Cadillac on behalf of his friend Mr. Grove, an elderly man who was too old to travel; he was taking the car to Bridgeport, New York, where he would meet Mr. Groves. (Id. at 553.) On September 8, 1978, Petitioner was arrested in Salt Lake City, Utah, again driving Mr. Grove's Cadillac. This time, he explained to authorities that he had obtained the vehicle in a trade with an elderly man in Norfolk, Virginia. (RT 6/21/85 at 682-83.) Prior to his arrest, he offered a third version of how he had come into possession of the Cadillac, telling Erhardt that he had obtained the

vehicle through a trade with an old man in Columbus, Ohio.[11] (Id. at 786-87.)

As previously discussed, after his arrest Petitioner spoke with John Duncan. He indicated to Duncan that he would deny to the authorities that he had been in Tempe or Prescott. (Id. at 825.) He also asked Duncan to destroy the credit card evidence. (Id.)

From August 2, 1978, to the time of his arrest, Petitioner used Mr. Grove's credit cards as he traveled throughout the United States, making fraudulent purchases at locations in twenty-eight states. (RT 6/25/85 at 976.) He also forged a check to himself on Mr. Grove's account and cashed it in Des Moines, Iowa, on August 7, 1978. Along with the credit cards, when Petitioner returned to Utah he was in possession of a ring owned by Mr. Grove. (See RT 6/21/85 at 643; RT 6/25/85 at 964-65.)

Although Petitioner changed the license plates on the Ford Fairmont to prevent it from being traced as a stolen vehicle, he left the original plates on the Cadillac as he drove it throughout the country for more than a month. (See RT 6/21/85 at 624, 6/25/85 at 925.) This circumstance suggested that Petitioner was not

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[11] At his first trial, Petitioner testified that he had obtained the Cadillac on August 2, 1978, in a trade with a French couple at a Phoenix truck stop. (RT 10/4/79 at 17-40.) According to Petitioner, the deal was brokered by a fellow inmate who had escaped from the Utah penitentiary and was working at an amusement park. (Id.) Petitioner did not testify at his retrial.

concerned that the vehicle's owner would report it as stolen.

In challenging the quality of the evidence upon which his conviction was based, Petitioner theorizes that Mr. Grove was murdered by one of a number of alternative suspects, or that he strangled himself to death. Such speculation is unsupported by the trial record. It is also insufficient to merit relief under Jackson. As the Ninth Circuit has explained, pursuant to Jackson, "[t]he existence of some small doubt based on an unsupported yet unrebutted hypothesis of innocence is not sufficient to invalidate an otherwise legitimate conviction." Taylor v. Stainer, 31 F.3d 907, 910 (9th Cir. 1994).

Based upon the information presented at trial, a rational juror could have found proof of Petitioner's guilt beyond a reasonable doubt.[12] Therefore, Petitioner is not entitled to relief on Claim H.

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[12] In Schad I, the Arizona Supreme Court reached the same conclusion. 129 Ariz. at 572, 633 P.2d at 381. Citing Jackson, the court rejected Petitioner's argument that his conviction should be overturned for lack of evidence:

> After reviewing the entire record, we are of the opinion that there was sufficient evidence from which a rational trier of fact could have found guilt beyond a reasonable doubt. Without recounting every incriminating fact which would support the conviction, we observe that defendant gave numerous contradictory versions as to how he came into possession of the victim's

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Claim J: Ineffective assistance of counsel—guilt phase.

Petitioner alleges that trial counsel was ineffective in two ways: (1) his failure to locate Mr. Duncan's wife, and (2) his failure to convince the court to admit evidence of the victim's mental health. (Dkt. 82 at 38.) Petitioner raised these claims in his supplemental PCR petition (ROA-PCR 319), and the court rejected them (M.E. 6/21/96 at 1-2).

As previously discussed, when a state court has addressed the merits of a petitioner's claim of federal

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Cadillac; denied using the victim's credit cards, and stated he had never been in Arizona until he discovered that the authorities could place him there on several occasions; personal effects belonging to the victim were found in the Ford Fairmont; a diamond ring belonging to the victim was found on Wilma [Erhardt's] finger; although defendant professed to have never met Larry Grove, he apparently knew that the victim was an elderly man when stopped by the New York State Trooper; defendant testified that several items of personal property found in the Cadillac were his, although other witnesses testified that they belonged to the victim. Based upon these facts and other evidence presented by the State, we cannot say that the jury was unjustified in disbelieving defendant's version of how he acquired the Cadillac. We find no error

Id.

constitutional error, a federal court may grant habeas relief only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see Yarborough v. Gentry, 540 U.S. 1, 4 (2003) (per curiam); Woodford v. Visciotti, 537 U.S. at 21. For a claim alleging ineffective assistance of counsel ("IAC"), the applicable law is set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984).

To prevail under Strickland, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. 466 U.S. at 687-88. The inquiry under Strickland is highly deferential, and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. To prove deficient performance, a defendant must also overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Under the AEDPA, the state court's decision is subject to another level of deference. Bell v. Cone, 535

U.S. 685, 698-99 (2002). In order to merit habeas relief, therefore, Petitioner must make the additional showing that the state court's ruling that counsel was not ineffective constituted an unreasonable application of Strickland. 28 U.S.C. § 2254(d)(1). The Court finds that Petitioner has failed to satisfy either Strickland or the AEDPA's deferential standard.

1. Failure to locate Duncan's wife.

Petitioner contends that Duncan's former wife, Sharon Sprayberry, possessed information that would have "completely impeached" Duncan's testimony regarding the statements Petitioner made during their jailhouse conversation. (Dkt. 82 at 38.) In an affidavit dated May 11, 1995, Sprayberry said that Duncan's visit to Petitioner was in fact arranged by Detective Halterman, that she was present at the conversation between Petitioner and Duncan, and, significantly, that "[d]uring the jail visit with Mr. Schad, Mr. Schad did not make any statements relating to a homicide in Arizona." (ROA-PCR 319, Ex. 2.)

The PCR court rejected Petitioner's claim that trial counsel was ineffective for failing to locate Sprayberry and secure her testimony.[13] (M.E. 6/21/96

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[13] In its order, the PCR court indicated that Sprayberry's "whereabouts were known by the defense at the time of the trial." (M.E.6/21/96.) Petitioner disagrees, as does trial counsel (Dkt.83, Ex. 3), but acknowledges that counsel's efforts to locate her were "diligent and thorough." (Dkt. 82 at 39.) Respondents observe that in his trial testimony Duncan indicated that his wife was in Johnson, Texas. (RT 6/21/85 at 852.) Given the Court's resolution
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at 2.) The court explained that this failure was not prejudicial:

> The proposed testimony of Sharon Sprayberry is certainly not new-it is merely cumulative impeachment and it is therefore, not even particularly material. Even if the testimony of Sharon Sprayberry as presented in affidavit form in this proceeding were accepted as true, this court cannot imagine how the outcome of this trial would have been changed by offering this rather limited impeachment testimony in the face of the overwhelming proof of the defendant's guilt from a variety of sources. This claim has no merit.
> (Id.)

This Court agrees that Petitioner has not shown that he was prejudiced by counsel's failure to present testimony from Sprayberry. The key information provided in the Sprayberry affidavit has little or no impeachment value because it does not contradict Duncan's testimony. According to Duncan, Petitioner told him that he would deny being in Arizona, particularly Prescott and Tempe; Duncan did not testify that Petitioner said anything about a homicide. (RT 6/21/85 at 825.) Duncan's testimony is therefore completely consistent*920 with the statement in Sprayberry's affidavit that Petitioner "did not make

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of this issue on the grounds of lack of prejudice, the Court need not evaluate counsel's efforts to locate Sprayberry.

any statements relating to a homicide in Arizona." (ROA-PCR 319, Ex. 2.) The remaining information in the affidavit consists primarily of inadmissible double hearsay relating what Duncan told Sprayberry about what Detective Halterman had told him. (Id.)

Petitioner further contends that the PCR court employed the incorrect standard for evaluating prejudice under Strickland. (Dkts. 82 at 40-41, 98 at 40.) The court stated that it "cannot imagine how the outcome of this trial would have been changed" by presenting Sprayberry's testimony. (M.E. 6/21/96 at 2.) According to Petitioner, this statement indicates that the court employed a higher, or "preponderance of the evidence," standard for showing prejudice than that required by Strickland – i.e., a reasonable probability of a different outcome. (Dkt. 82 at 41.) The Court disagrees. While the PCR court's formulation does not use the phrase "reasonable probability," the most plausible reading of the statement, keeping in mind the presumption that courts are presumed to know and apply the law, see, e.g., Beaty v. Stewart, 303 F.3d 975, 986 (9th Cir. 2002), is that in using the phrase "cannot imagine" the PCR court indicated that there was no reasonable probability that the outcome of the case would have been different if Sprayberry had testified. See Kyles v. Whitley, 514 U.S. 419 (1995). In any case, even under a de novo review of the issue, this Court finds that Petitioner's claim of prejudice lacks merit.

Petitioner was not prejudiced by trial counsel's failure to present testimony from Sprayberry. The PCR court's denial of this claim was neither contrary to nor an unreasonable application of federal law.

2. **Failure to properly present motions for the appointment of an expert on the victim's mental health and for the admission of the victim's mental health records.**

Petitioner alleges that trial counsel was ineffective for failing to make a proper offer of proof regarding Mr. Groves' mental health records. (Dkt. 82 at 45-49.) Petitioner also claims that counsel's performance was ineffective based on his failure to move the trial court to reconsider its denial of his motion for the appointment of an expert witness regarding the victim's mental health. (Id.)

Trial counsel, in an attempt to support one of his defense theories that the victim committed suicide by strangling himself to death moved the court to appoint Dr. Otto Bendheim for the purpose of performing a "psychiatric autopsy" of Mr. Grove.[14] (ROA-PCR 156.) In his motion, counsel indicated that Dr. Bendheim had reviewed Mr. Grove's medical records and reached the "tentative conclusions" that at the time of his death "Mr. Grove was suffering from a depressive neurosis, schizophrenia and was psychotic," that his mental

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[14] In his motion, counsel also advanced the proposition that Mr. Grove's deteriorating mental state may have led him to act recklessly and associate with dangerous persons. (ROA-PCR 156 at 2-3.) Petitioner no longer relies on this theory as a basis for the admissibility of information about the victim's mental state at the time of his death, presumably because it is indistinguishable from the scenario presented to the two juries that convicted Petitioner.

health had recently deteriorated, and that "he was potentially very suicidal." (Id. at 3.) The State filed a response in opposition to the motion (ROA-PCR 169), and defense counsel filed a reply memorandum (ROA-PCR 181), which again detailed counsel's arguments in favor of the admissibility of the records. The trial court denied the motion summarily. (M.E.6/14/85.)

Near the close of his case, defense counsel sought to introduce Mr. Grove's medical records from the Veterans' Administration in Tucson; counsel made an oral offer of proof as to the contents and relevancy of the records. (RT 6/27/85 at 1320-21.) The trial court granted the State's motion to exclude the records, finding that the evidence adduced at trial did not support the theory that Mr. Grove strangled himself, that Mr. Grove's medical records were irrelevant, that their introduction constituted an attack on the victim's character, and that the information contained therein would confuse the jury and be unduly prejudicial. (Id. at 1323-24.)

In his preliminary PCR petition, Petitioner raised the claim that trial counsel's efforts to present evidence of Mr. Grove's mental health were deficient. (ROA-PCR 245 at 9-10.) In rejecting the claims, the PCR court explained:

> [C]ounsel once again argues that Dr. Otto Bendheim should have been appointed to perform a psychological autopsy on the victim of this murder. Counsel now advances the theory that it was ineffective assistance of counsel to fail to move the court for reconsideration of its

> order denying this request and fail to introduce the victim's mental health records. This court cannot imagine what would have been accomplished (after full briefing and oral argument) to move for reconsideration. This court would not have reconsidered that ruling and is not reconsidering it now. The defendant has not pointed out how introduction of the psychological records would have swayed the court's judgment because of defendant is [sic] unable to do so. There is no allegation that newly discovered evidence is now available to cause the court to reconsider what this court considers to be an imminently [sic] correct decision. Quite simply put, defense counsel is under no obligation to file frivolous pleadings and this is precisely what the defendant is suggesting that counsel should have done. The claim has no merit.

(M.E. 6/21/96 at 1-2.)

Petitioner again contends that counsel should have moved the court to reconsider its order denying the appointment of Dr. Bendheim; according to Petitioner, the appropriate procedure would have been for counsel to have made an offer of proof referencing the testimony of witnesses who had observed Mr. Grove's allegedly uncharacteristic behavior in the period leading up to his death. (Dkt. 82 at 46.) Petitioner also asserts that counsel should have made a more extensive offer of proof regarding the victim's medical records. (Id.) Petitioner argues that such a proffer, which should have included testimony from Dr.

Bendheim, would have remedied the trial court's misunderstanding regarding the purpose for which the records were being offered. (Id. at 46-47.)

The Court notes that the issue underlying this aspect of Petitioner's IAC claim – the admissibility of evidence regarding the victim's mental condition – involves a state court's evidentiary ruling.[15] As the United States Supreme Court has explained, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67 (1991). Because the PCR court, applying state evidentiary rules, determined that the evidence was inadmissible, this Court cannot find that trial counsel was ineffective for failing to try a different tactic to secure its admission.

In addition, the Court finds that Petitioner was not prejudiced by the manner in which counsel sought permission from the court to raise the victim's mental health as a defense. It is apparent, for example, that the PCR court did not misapprehend the purpose of counsel's attempt to present evidence of the victim's mental health. Counsel made it clear, in his filings seeking the appointment of Dr. Bendheim and in his oral offer of proof regarding the medical records, that his goal was to use such information to support his

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[15] Petitioner concedes that this aspect of his IAC claim is premised on a finding that the trial court erred in its rulings on defense counsel's motions. (Id. at 46.) As discussed with respect to Claim AA, the Court has found that those rulings were not erroneous.

theory that Mr. Grove committed suicide. In its order denying the IAC claim, the court explained that it made its rulings denying trial counsel's motions "after full briefing and oral arguments." (M.E. 6/21/96 at 2.) The court then indicated that, even had trial counsel proceeded in the manner Petitioner now advocates, the court would not have reconsidered its evidentiary rulings. (Id.) Based upon the PCR court's order, this Court cannot find that Petitioner has shown any probability that trial counsel's failure to file a motion to reconsider or to present a more detailed offer of proof affected the trial court's rulings; consequently, Petitioner has failed to show that, absent the alleged deficiencies in counsel's performance, there was a reasonable probability that the outcome of the case would have been different.

For the reasons set forth above, the PCR court's rejection of Petitioner's guilt-stage IAC claims was neither contrary to nor an unreasonable application of clearly established federal law. Therefore, Petitioner is not entitled to relief on Claim J.

Claim L: **Petitioner's rights under the Fifth, Eighth, and Fourteenth Amendments were violated by the use of his prior conviction for second-degree murder as an aggravating circumstance.**

Petitioner alleges that his rights were violated when the trial court improperly determined that his prior conviction for second-degree felony murder was an aggravating circumstance under former A.R.S. § 13-454(E)(1) ("that the defendant has been convicted of

another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable") and (E)(2) (prior conviction for a felony involving violence).[16] (Dkt. 82 at 50.) Petitioner also challenges the constitutional validity of the prior conviction. Petitioner's arguments lack merit.

1. Background.

In 1968, a Salt Lake County jury convicted Petitioner of felony murder in the second degree. See State v. Schad, 24 Utah 2d 255, 257, 470 P.2d 246, 247 (1970). The court imposed a sentence of ten years to life. (ROA-PCR 223 at 3.) Petitioner appealed the conviction on the grounds that the evidence was insufficient to justify the verdict and that the trial court erred in giving a felony-murder instruction relating to sodomy. Schad, 24 Utah 2d at 257, 470 P.2d at 247. The Utah Supreme Court upheld the conviction. Id. at 261, 470 P.2d at 250.

Rejecting the first claim, the court reviewed the evidence produced at trial, which included undisputed facts that linked Petitioner to the victim and the crime scene and that contradicted Petitioner's version of events.[17] The court concluded that it was "unable to

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[16] These aggravating factors are now codified at A.R.S. § 13-703(F)(1) and (F)(2).

[17] The body of the victim, Clare Mortensen, was found in a closet; "his hands were tied behind his back with leather thongs and nylon cord; his ankles were also bound and two pieces of cloth were tied around his mouth and neck." Schad, 24 Utah 2d at 258, 470 P.2d at 247. Laces from a pair of combat boots were used to

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say that reasonable minds could not have believed beyond a reasonable doubt that the defendant committed the crime." Id. at 259, 470 P.2d at 248.

The Utah Supreme Court also rejected Petitioner's argument regarding the felony–murder instruction. Citing the state's murder statutes,[18] the court ruled:

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bind the victim; a witness observed that Petitioner's combat boots were missing their laces. Id. Petitioner, who was absent without leave from the Army at the time, was seen with the victim before his death; he subsequently lied to several acquaintances about the victim's whereabouts. Id. at 258-59, 470 P.2d at 247-48. After Mr. Mortenson's death Petitioner had possession of his wallet, which he discarded in his, Petitioner's, hotel room; he also used the victim's credit card to purchase an airline ticket to Germany, where he was eventually apprehended. Id. at 259, 470 P.2d at 248.

Physical evidence of a sexual encounter was found on the deceased, and the medical examiner, Dr. James Weston, opined that "death had resulted because deceased's neck had been bound so tightly it prevented a return flow of blood from his head; and that this had been done to heighten erotic stimulus in an act of sodomy." Id. Dr. Weston also indicated that in his opinion the death was probably accidental. (See RT 8/22/85 at 30.)

[18] At the time of Petitioner's 1968 conviction, Section 76-30-3, U.C.A.1953, provided:

> Degrees of murder.-Every murder perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of

(Continued)

Defendant seems to essay the position that because the killing was not in the commission of one of the named felonies involving violence: arson, rape, burglary or robbery, there should have been no instruction on felony murder. This position is not tenable because it ignores the subsequent portions of our statute. It is not to be doubted that murder must come within the definition set forth therein. But that also provides for "any other homicide committed under circumstances which would have constituted murder at common law." This included death resulting from the perpetration of any felony. We agree with the reasoning of the cases cited by the defendant that in order for death to constitute murder because it results in the commission of a felony, the felony must be one which may cause death because it may be dangerous to human life. This reasoning correlates with the part of our statute making it murder if a death results from "any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life." However, we fail to see how that affords any comfort or protection to the defendant in this case. In listing certain felonies which are

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human life;—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree.

> dangerous to the lives of others, it certainly was not intended to exclude other felonies which might be so; and this must be determined from the circumstances of the particular crime.

Id. at 260-61, 470 P.2d at 249-50.

2. A.R.S. § 13-454(E)(1).

On federal habeas review of the state court's application of aggravating factors, this Court considers only whether the state court's finding "was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (counseling that such a review demands "respect for a state court's findings of fact and application of its own law"); see Moormann v. Schriro, 426 F.3d 1044, 1053 (9th Cir. 2005).

Petitioner claims that the prior conviction was not an offense "for which under Arizona law a sentence of life imprisonment or death was imposable" under § 13-454(E)(1) because the Utah conviction did not satisfy the elements of second-degree murder in Arizona at the time he was convicted. (Dkt. 82 at 53-55.) Petitioner contends that the 1968 conviction does not support a finding of "malice aforethought," an element of Arizona's second-degree murder statute. (Id.)

On direct appeal, the Arizona Supreme Court rejected Petitioner's claim, explaining that the facts surrounding the 1968 offense brought it into accord with Arizona's definition of second-degree murder:

The main thrust of the defendant's argument is that the changes in the criminal code, reducing the punishment for sodomy to a misdemeanor and the elimination of the offense of second degree felony murder, require that the defendant's Utah conviction not be considered an aggravating circumstance for sentencing. The defendant's argument seeks not only to have us ignore the requirement that we consider the penalty imposable at the time of the conviction, but it mischaracterizes the nature of the defendant's Utah conviction.

In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. State v. Tittle, 147 Ariz. 339, 710 P.2d 449 (1985). The defendant concedes that pursuant to former A.R.S. §§ 13-453(B) and -1644, the maximum penalty for second-degree murder in 1968 was life imprisonment. See State v. Williams, 103 Ariz. 284, 440 P.2d 311 (1968). However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a

> dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. See State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970).
>
> The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but the manner in which it was performed. Schad, 24 Utah 2d at 261, 470 P.2d at 250. Irrespective of the debate concerning the constitutionality of statutes prohibiting consensual sodomy, it is clear that a state may lawfully punish a person for engaging in conduct exhibiting knowing or reckless disregard for human life. See A.R.S. §§ 13-1103(A)(1), -104(A)(3). This is the crux of the defendant's Utah conviction. Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

Schad III, 163 Ariz. at 418-19, 788 P.2d at 1169-70.

Petitioner urges this Court to find that the Arizona Supreme Court erroneously interpreted Arizona's second-degree murder and manslaughter statutes. (Dkt. 82 at 54-55.) However, as the Ninth Circuit recently observed, "If a state law issue must be decided in order to decide a federal habeas claim, the state's construction of its own law is binding on the federal court." Horton v. Mayle, 408 F.3d at 576 (citing Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("This Court ... repeatedly has held that state courts are the

expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here") (citations omitted)); see Hawkins v. Mullin, 291 F.3d 658, 662-63 (10th Cir. 2002) (habeas court is bound by state court's interpretation of its felony-murder statute).

In determining that the circumstances surrounding the killing of Mr. Mortenson met the definition of second-degree murder in Arizona, the state supreme court construed its own law. This Court is bound by that interpretation, and thus concludes that the state court's decision was neither arbitrary nor capricious. See Jeffers, 497 U.S. at 780. Therefore, Petitioner's claim that the state courts violated his constitutional rights by erroneously applying the (E)(1) aggravating factor is without merit.

3. A.R.S. § 13-454(E)(2).

Petitioner contends that the trial court erred in finding that his prior conviction involved a crime of violence as defined by A.R.S. § 13-454(E)(2). (Dkt. 82 at 55-56.)

In finding that this factor had been proved, the trial court took judicial notice that a killing in which the "victim was bound hand and foot, gagged and choked to death" was a crime involving violence. (ROA-PCR 225 at 2.) The court also found three aggravating circumstances. (RT 8/29/85 at 10.) Although the court indicated that "[e]ach is a very substantial factor in this court's sentencing decision," it concluded that "the

total mitigation is not sufficient to overcome any one of the aggravating circumstances." (Id.)

On direct appeal, the Arizona Supreme Court declined to determine whether the (E)(2) aggravating circumstance had been established:

> It is not necessary for us to resolve this issue because the trial judge, in his special findings, found that the total mitigation present was "not sufficient to overcome any one of the aggravating circumstances." Any one of the other aggravating factors would be sufficient to support the sentence.

Schad III, 163 Ariz. at 419, 788 P.2d at 1170.

Because both the trial court and the Arizona Supreme Court, in its independent review of Petitioner's sentence, concluded that any one of the aggravating circumstances found by the trial court was sufficient to outweigh the totality of the mitigating evidence, it is unnecessary for this Court to review the trial court's findings regarding § 13-454(E)(2). As discussed below, Petitioner cannot show that he was prejudiced by the trial court's determination that the prior conviction satisfied both (E)(1) and (E)(2).

4. Constitutionality of the 1968 conviction.

Petitioner raises several challenges to the constitutional validity of his 1968 conviction. First, he alleges that he was denied appellate due process in the Utah courts based upon the "failure of the Utah

Supreme Court to fairly and consistently apply the law in Petitioner's case." (Dkt. 82 at 58-59.) This allegation is premised on Petitioner's characterization of the holding in State v. Bolsinger, 699 P.2d 1214 (Utah 1985), a case decided fifteen years after the supreme court affirmed Petitioner's conviction.[19] (Id.) Petitioner also contends that the Utah and Arizona laws criminalizing consensual sodomy are unconstitutional and violate his equal protection and privacy rights.[20] (Id. at 59.)

As Respondents note, Petitioner is precluded from challenging his prior conviction in this habeas

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[19] In Bolsinger, a case involving a death caused by auto-erotic asphyxiation during consensual heterosexual sex, the court held that there was insufficient evidence to support a finding of depravity necessary for a second-degree murder conviction. 699 P.2d at 1219-21. As Respondents observe, Bolsinger involved the interpretation of a different murder statute, and was factually distinguishable from Petitioner's conviction on grounds other than the sexual orientation of the participants. In Bolsinger, the defendant testified at trial, denying that he intended to harm the victim and explaining that he pulled on the clock radio cord around the victim's neck at her insistence during intercourse. Id. at 1215-16. In addition, the victim was highly intoxicated, which may have hastened her death. Id. at 1216. Moreover, the victim in Bolsinger, unlike Mr. Mortenson, was not gagged, nor were her feet bound or her hands tied behind her back. Id. at 1215.

[20] In his Notice of Supplemental Authority, Petitioner cites Lawrence v. Texas, 539 U.S. 558 (2003). (Dkt. 111 at 5.) In Lawrence, the Supreme Court, overruling Bowers v. Hardwick, 478 U.S. 186 (1986), held that the liberty interest protected by the Due Process Clause prohibits states from enacting laws criminalizing homosexual sodomy between consenting adults.

action. In Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001) (citing Daniels v. United States, 532 U.S. 374, 382 (2001)), the United States Supreme Court explained that:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Petitioner does not contend that his 1968 conviction remains open to direct or collateral attack. (See Dkt. 98 at 55-56.) Therefore, his constitutional challenges to the prior conviction are foreclosed and the Court need not address their validity.[21]

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[21] The Coss Court noted that an exception to this rule exists where the petitioner was denied his right to counsel in the prior case. 532 U.S. at 404, 121 S.Ct. 1567. This exception is not applicable because the record reflects that Petitioner was represented by counsel at his 1968 trial. See Schad, 24 Utah 2d at 259, 470 P.2d at 248.

5. Miscellaneous arguments.

Petitioner argues that he is entitled to relief because, after his 1968 conviction, Utah and Arizona reduced the offense of sodomy from a felony to a misdemeanor. (Dkt. 82 at 56.) According to Petitioner, this fact indicates that the imposition of the death penalty in his case was "wanton and freakish." (Id. at 57.) As Respondents note, the Ninth Circuit has squarely rejected the argument that a subsequent reduction in the maximum sentence imposable for a prior conviction renders use of the § 13-454(E)(1) factor "offensive or arbitrary under the Constitution." Gerlaugh v. Stewart, 129 F.3d 1027, 1044 (9th Cir. 1997).

Petitioner also contends that the trial court and the Arizona Supreme Court impermissibly "double-counted" the prior conviction. (Dkt. 82 at 57.) On direct appeal, the Arizona Supreme Court rejected Petitioner's argument that using the prior conviction as the basis for two aggravating factors violated his double jeopardy rights. Schad III, 163 Ariz. at 419, 788 P.2d at 1170. The court explained:

> So long as the trial court weighed the aggravating circumstances arising out of the 1968 murder only once, the defendant's rights have not been infringed. Here the trial judge found that the totality of the mitigating circumstances was insufficient to overcome even a single aggravating factor. Hence, it did not matter that the trial court found two aggravating factors arising from his prior

> conviction since one was enough to impose the death penalty.

Id. (citation omitted).

Neither the trial court nor the Arizona Supreme Court weighed the 1968 conviction twice when assessing aggravating and mitigating factors. In fact, as already noted, the Arizona Supreme Court explicitly declined to consider the (E)(2) factor in its independent review of Petitioner's sentence. Petitioner's argument is without merit.

6. Prejudice.

A habeas petitioner is not entitled to relief unless he can establish that a trial error resulted in actual prejudice. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); see Allen v. Woodford, 395 F.3d 979, 1011 (9th Cir.2005).

In sentencing Petitioner the trial court found that three aggravating circumstances had been proved and determined that the totality of the mitigation evidence was not sufficient to outweigh any single aggravating factor. (ROA-PCR 223.) After carrying out its independent review, the Arizona Supreme Court affirmed the death sentence, finding that two aggravating circumstances existed and agreeing with the trial court that the mitigation evidence was insufficient to outweigh either aggravating factor. Schad III, 163 Ariz. at 421, 788 P.2d at 1172. Given these circumstances, even if this Court were to determine that the 1968 conviction could not form the

basis of a valid aggravating factor, the existence of the pecuniary gain factor would nonetheless be sufficient to support the death sentence. Because elimination of the factors associated with the 1968 conviction would not alter his sentence, Petitioner cannot show that he was actually prejudiced by the use of the prior conviction as an aggravating factor.

In reaching this conclusion, the Court rejects Petitioner's argument that prejudice exists pursuant to the holding in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). According to Petitioner, because the prior conviction formed the basis of the only two aggravating factors found by the first sentencing court, if that conviction were invalidated, Bullington would bar the imposition of the death sentence at Petitioner' retrial. Petitioner contends, therefore, that he was prejudiced by the state court's erroneous use of the prior conviction as an aggravating circumstance. Petitioner misconstrues the holding in Bullington.

In Bullington, the Supreme Court held that a capital defendant who is sentenced to life imprisonment instead of death is protected by the Double Jeopardy Clause against imposition of the death penalty in the event that he is retried and reconvicted. Id. at 446; see Arizona v. Rumsey, 467 U.S. 203, 211 (1984). This is because a life sentence for a defendant in such a case represents "an acquittal on the merits of the central issue in the [sentencing] proceeding-whether death was the appropriate punishment." Rumsey, 467 U.S. at 211.

This rationale does not apply, however, in a case such as Petitioner's, where the defendant was not "acquitted" of the death penalty at the first trial but was in fact "convicted" – i.e., sentenced to death. Poland v. Arizona, 476 U.S. 147, 154 (1986). In Poland, the first trial court sentenced the defendants to death on the basis of a single aggravating factor, that the crime was committed in an especially heinous manner. See State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982). The court found that the pecuniary gain factor did not apply.[22] Id. The Arizona Supreme Court reversed and remanded for retrial on the grounds of jury misconduct; the court also noted that there was insufficient evidence to support the "especially heinous" factor. Id. The defendants were convicted on retrial, and the court again imposed the death sentence, this time finding that both the pecuniary gain factor and the especially heinous factor had been proved. See State v. Poland, 144 Ariz. 388, 404, 698 P.2d 183, 199 (1985). The Arizona Supreme Court again determined that the especially heinous factor had not been proved but found that the pecuniary gain factor was properly applied and upheld the sentence. Id. at 405, 407, 698 P.2d at 200, 201.

In affirming the sentence, and distinguishing the case from Rumsey, where the sentencing court found no aggravating circumstances, the United States Supreme Court explained that "the proper inquiry is

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[22] As the supreme court pointed out, the trial court had misconstrued the pecuniary gain factor, believing that it applied only to contract killings. Poland, 132 Ariz. at 286, 645 P.2d at 801. See infra, p 42.

whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' *that the death penalty is appropriate.*" Poland, 476 U.S. at 155 (quotation omitted). In such a case, the Double Jeopardy Clause acts to protect the finality of an acquittal. Id. at 156, 106 S.Ct. 1749. By contrast, where a sentencer convicts a defendant of the death penalty, as the first trial court did with respect to Petitioner, "[t]here is no cause to shield such a defendant from further litigation." Id.

Under Bullington, Rumsey, and Poland, a finding that Petitioner's 1968 conviction was invalid would not transform his initial sentence into the equivalent of an acquittal of the death penalty for double jeopardy purposes. Therefore, contrary to Petitioner's contention, his resentencing would not constitute a violation of the Double Jeopardy Clause. Moreover, because the state courts determined, after retrial, that the pecuniary gain aggravating factor had been proved, and that it alone outweighed the totality of the mitigation evidence, Petitioner cannot show harm resulting from the courts' application of additional aggravating circumstances based upon the prior conviction.

For the reasons set forth above, Petitioner is not entitled to relief on Claim L.

Claim M: Pecuniary gain aggravating circumstance is unconstitutional on its face and as applied to Petitioner.

In its special verdict, the trial court found that the State had proved that Petitioner had "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value" pursuant to the former A.R.S. § 13-454(E)(5) (now § 13-703(F)(5)). (ROA-PCR 225 at 2.) In Claim M, Petitioner alleges that the pecuniary gain factor is unconstitutional on its face and as applied to his sentence. (Dkt. 82 at 60-66.) Petitioner challenges the application of the factor to his sentence on the grounds that the factor underwent a "judicial enlargement" prior to his second trial, thereby violating the Constitution's bar on ex post facto laws. (Id. at 60-61.) Petitioner also claims that the pecuniary gain aggravating factor is vague and overbroad and fails to narrow the class of death-eligible defendants. (Id. at 61-64.) In a related argument, Petitioner contends that the finding of the pecuniary gain factor was arbitrary and capricious because the factor repeats an element of the underlying offense of felony murder. (Id. at 63-64.) Finally, Petitioner contends that application of the factor to his sentence was not supported by sufficient evidence. (Id. at 64-65.) Petitioner's arguments are without merit.

1. Ex post facto violation.

Petitioner alleges that his due process rights were violated because in the interval between his two trials, the Arizona Supreme Court unforeseeably

expanded the scope of the pecuniary gain aggravating factor when it explained, in State v. Clark, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980), that the factor was not limited in its application to murders committed by "hired guns."[23] On direct appeal, the Arizona Supreme Court rejected Petitioner's ex post facto argument:

> The Clark opinion did not create substantive law, it merely recognized the pre-existing scope of present law. It was not an unforeseeable enlargement nor did it suddenly make lawful conduct unlawful. As in Clark, finding that the defendant committed this crime for pecuniary gain is not a violation of the defendant's due process rights.

Schad III, 163 Ariz. at 420-21, 788 P.2d at 1170-71.

As Petitioner acknowledges, the Ninth Circuit has also rejected this ex post facto argument. Poland v. Stewart, 117 F.3d 1094, 1100 (9th Cir. 1997) ("The reading given to the statute by the Arizona Supreme Court in ... Clark was not unforeseeable, nor an enlargement of the usual and ordinary meaning of the statute."). This Court agrees with the Ninth Circuit that the language of (E)(5), which contains the phrase

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[23] In Petitioner's first trial, the court found that the pecuniary gain aggravating factor was not present. (RT 12/27/79 at 4.) This finding was based solely upon the court's presumption that "the legislative intent [of the pecuniary gain factor] was to cover a contract killing." (Id. at 4-5.) The court noted that if its presumption was incorrect-as it turned out to be, as announced by the holding in Clark-the factor would apply. (Id. at 5.)

"or in expectation of the receipt, of something of pecuniary value," provided fair notice to Petitioner "that his conduct was 'at risk.'" Id.

2. Facial invalidity and double counting.

Petitioner alleges that the pecuniary gain aggravating factor fails to perform the constitutionally-mandated narrowing function and is therefore invalid on its face. Specifically, Petitioner contends that the factor impermissibly fails to "distinguish between a premeditated killing for hire and one where the victim is killed without intent or premeditation during a robbery" and therefore "provides no meaningful basis for distinguishing those few cases in which a death sentence is appropriate from those many cases ... in which it is not." (Dkt. 82 at 61.) Petitioner also argues that the pecuniary gain factor fails to perform a narrowing function, and thus leads to the arbitrary imposition of the death penalty, because it repeats an element of the underlying offense in cases where a defendant is eligible for the death sentence based on a charge of felony-murder involving a robbery.[24] (Id. at 64.)

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[24] The trial court instructed the jury on both premeditated murder and felony murder. (RT 6/27/85 at 1403-04.) The court provided a single verdict form, however, so it is impossible to determine which theory of first-degree murder was the basis of the conviction. Therefore, Petitioner's arguments in these subclaims are based upon the premise that the jury convicted him of felony murder.

On direct review, the Arizona Supreme Court rejected Petitioner's argument that the pecuniary gain factor was unconstitutionally vague. Schad III, 163 Ariz. at 419, 788 P.2d at 1170. By independently reviewing the record and affirming Petitioner's sentence, the supreme court implicitly rejected the argument that the trial court arbitrarily applied the pecuniary gain aggravating circumstance to Petitioner's sentence. (See Dkt. 59 at 16.) Because the supreme court did not provide a rationale for this aspect of its holding, this Court has performed an independent review of the record pursuant to Pirtle v. Morgan, 313 F.3d at 1167. The Court has determined that the ruling of the Arizona Supreme Court upholding the application of the pecuniary gain circumstance to Petitioner's sentence was not objectively unreasonable under controlling federal law.

As Respondents note, Petitioner's arguments are disposed of by the Ninth Circuit's holding in Woratzeck v. Stewart, 97 F.3d 329, 335 (9th Cir.1996). In Woratzeck, the court applied the principles set forth in Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), to conclude that "[f]actor (F)(5) sufficiently channels the sentencer's discretion and does not result in unconstitutionally disproportionate imposition of the death penalty when applied to felony-murder defendants." In reaching this conclusion, the court expressly rejected arguments identical to those raised by Petitioner. Id. at 334-35. First, the court explained that the pecuniary gain factor is constitutionally permissible because it "is not automatically applicable to someone convicted of robbery felony-murder" and therefore "serves to narrow the class of death-eligible

persons sufficiently." Id. at 334. Next, citing State v. Greenway, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991), the Woratzeck court stated that the pecuniary gain factor does not result in double-counting between the elements of a felony murder charge and the pecuniary gain factor because not every felony murder that occurs in the course of a robbery is motivated by pecuniary gain; therefore, the motivation of pecuniary gain must be proven as a fact in addition to the elements of the underlying crime. Id. Finally, the court considered the argument that application of the pecuniary gain factor to a felony-murder charge results in an overbroad and arbitrary imposition of the death penalty. Id. at 335. The Ninth Circuit rejected this argument, offering the following observation:

> That someone who intentionally kills might not be sentenced to death in Arizona does not mean that Woratzeck's death sentence is unconstitutional. If an intentional killing is done for pecuniary gain, then death is also a permitted penalty. Woratzeck's first-degree felony-murder conviction is treated no differently from any first-degree conviction for intentional killing and neither crime alone can result in death absent a finding of one or more aggravating circumstances. The State of Arizona could rationally conclude that a defendant's motive to murder more accurately reflects his relative culpability than whether the murder is done with an affirmative intent to kill or "merely" an utter disregard for whether the victim lives or dies.

Id.

The decision of the Arizona Supreme Court rejecting Petitioner's constitutional challenges to the pecuniary gain factor was neither contrary to nor an unreasonable application of federal law.

3. Insufficient evidence.

Petitioner contends that there was insufficient evidence to show that the murder was committed for pecuniary gain. (Dkt. 82 at 64-66.) He claims that the evidence suggesting he killed the victim for pecuniary gain was circumstantial and susceptible to conflicting interpretations. (Id. at 65-66.)

As noted above, when reviewing a state court's application of an aggravating factor, this Court must determine whether the decision was so arbitrary or capricious as to result in an independent constitutional violation. Lewis v. Jeffers, 497 U.S. at 780, 110 S.Ct. 3092. In carrying out this review, the Court applies the "rational factfinder" standard; i.e., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. Id. (quoting Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. 2781) (emphasis in Jackson).

"[A] finding that a murder was motivated by pecuniary gain for purposes of § 13-703(F)(5) must be supported by evidence that the pecuniary gain was the impetus of the murder, not merely the result of the

murder." Moormann, 426 F.3d at 1054. On direct review of this claim, the Arizona Supreme Court rejected Petitioner's argument that there was insufficient evidence to prove that the murder of Mr. Grove was motivated by pecuniary gain:

> Prior to encountering the victim, the defendant was driving a stolen car. He abandoned that car and took the victim's car. He also left the murder scene with the victim's wallet, money, credit cards and ring. This provides strong circumstantial evidence that the purpose of the murder was pecuniary gain. The evidence strongly supports the finding by the trial judge that the aggravating circumstance of pecuniary gain existed in this case.

Schad III, 163 Ariz. at 420-21, 788 P.2d at 1171-72 (citation omitted).

The Court agrees. Based upon the facts proven at the trial, a rational factfinder could have determined that Petitioner murdered Mr. Groves in the expectation of pecuniary gain. See Correll v. Stewart, 137 F.3d 1404, 1420 (9th Cir. 1998); Woratzeck, 97 F.3d at 336. Indeed, despite Petitioner's argument that the evidence could lead to contradictory inferences, it is difficult to ascribe a motivation other than pecuniary gain to the offense against Mr. Grove, who was a complete stranger to Petitioner. Compare State v. Wallace, 151 Ariz. 362, 368, 728 P.2d 232, 238 (1986) (insufficient evidence to support pecuniary gain aggravating factor where defendant's motive was

relationship difficulties with the victim and the taking of money and keys was incidental to the murder).

For the reasons discussed above, Petitioner is not entitled to relief on Claim M.

Claim N: **The trial court failed to consider and give effect to specific mitigating evidence.**

Claim Q: **The Arizona Supreme Court failed to consider, give effect to, and properly weigh mitigation evidence.**

Petitioner alleges that the trial court and the Arizona Supreme Court failed to consider and give effect to the mitigation evidence he presented at sentencing. (Dkt. 82 at 66-80.) The Court disagrees.

1. General principles.

Under the constitution, in capital sentencing proceedings the sentencer must not be precluded from considering relevant mitigation evidence. See Lockett v. Ohio, 438 U.S. 586 (1978). In Lockett and subsequently in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court held that under the Eighth and Fourteenth Amendments the sentencer must be allowed to consider, and may not refuse to consider, any constitutionally relevant mitigating evidence. Eddings, 455 U.S. at 113-14. Constitutionally relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604.

However, while the sentencer must not be foreclosed from considering relevant mitigation information, "it is free to assess how much weight to assign to such evidence." Ortiz v. Stewart, 149 F.3d 923, 943 (9th Cir. 1998); see Eddings, 455 at 114-15 ("The sentencer ... may determine the weight to be given relevant mitigating evidence").

On habeas review the federal court does not evaluate the substance of each piece of evidence submitted as mitigation; rather, it reviews the state court record to ensure that the state court allowed and considered all relevant mitigation. See Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) (when it is evident that all mitigating evidence was considered, the trial court is not required to discuss each piece of such evidence). As the Ninth Circuit has noted, "the trial court need not exhaustively analyze each mitigating factor 'as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant.' " Moormann, 426 F.3d at 1055 (quoting Clark v. Ricketts, 958 F.2d 851, 858 (9th Cir. 1991)); see Parker v. Dugger, 498 U.S. 308, 314-15, 318 (1991) (the sentencing court properly considered all information, including nonstatutory mitigation, where the court stated that it considered all the evidence and found no mitigating circumstances that outweighed the aggravating circumstances); LaGrand v. Stewart, 133 F.3d 1253, 1263 (9th Cir. 1998); Gerlaugh v. Stewart, 129 F.3d at 1044; Poland v. Stewart, 117 F.3d at 1101.

2. Claim N.

In Claim N, Petitioner contends that the trial court failed to give sufficient weight to four specific mitigating circumstances: (1) Petitioner's abusive, unstable childhood with an alcoholic father; (2) prior to the first trial the prosecution offered Petitioner a plea agreement that included a life sentence; (3) Petitioner's change of character on death row; and (4) the accidental and pleasurable nature of the victim's death in the Utah conviction. Petitioner raised the latter two allegations, (3) and (4), on direct appeal. (Appellant's Opening Brief at 43.) He raised the first two allegations in his preliminary PCR petition (ROA-PCR 245 at 10-11), and the court denied them as procedurally precluded (M.E.3/27/96). Therefore, because the state courts did not reach the merits of allegations (1) and (2), this Court performs a de novo review. Pirtle, 313 F.3d at 1167.

In sentencing Petitioner the trial court found three aggravating circumstances. (ROA-PCR 225 at 1-2.) The court then made findings with respect to statutory and nonstatutory mitigating factors. (Id. at 3-5.) The court indicated that it "considered all matters brought before it, including (without limitation) the pre-sentence report and attachments, the pre-sentence hearing and exhibits admitted at that hearing, the Defendant's sentencing memorandum and the evidence adduced at trial." (Id. at 3.) In his sentencing memorandum and at the sentencing hearing, Petitioner argued and presented extensive testimony regarding the four specific factors cited in Claim N. (ROA-PCR 222 at 23-33; RT 8/22/85.)

The trial court found that Petitioner had not proved any of the statutory mitigating factors. (ROA-PCR 225 at 3-4.) With respect to nonstatutory mitigating circumstances, the court found that Petitioner was a "model prisoner" and that he "shows signs of rehabilitation and of possessing a good, stable character." (Id. at 4.) The court considered Petitioner's character and conduct in prison as "[t]he most persuasive mitigating circumstances." (RT 8/29/85 at 9.) The court also considered Petitioner's "unfortunate childhood" but concluded that it was "not a persuasive mitigating circumstance." (ROA-PCR 225 at 4.) The court explained that it "reject[ed] defendant's argument that the offer of a plea agreement at some time prior to a jury trial and conviction operates to limit the court's sentencing prerogatives." (RT 8/29/85 at 9.) In its assessment of mitigating factors, the court did not explicitly address Petitioner's arguments about the circumstances surrounding the Utah murder conviction. The court concluded by stating that "[n]umerous mitigating circumstances were found to exist" but that "the total mitigation is not sufficient to overcome any one of the aggravating circumstances." (Id. at 10.)

On direct appeal, the Arizona Supreme Court rejected Petitioner's claim "that the trial court erred by failing to consider the defendant's potential for rehabilitation and the circumstances of the Utah murder." Schad III, 163 Ariz. at 421, 788 P.2d at 1172. The court explained:

> A.R.S. § 13-703(E) requires that the trial court "take into account the ... mitigating circumstances" and then determine whether those circumstances are "sufficiently substantial to call for leniency." Mitigating circumstances include "any factors ... which are relevant in determining whether to impose a sentence less than death...." A.R.S. § 13-703(G).
>
> Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors. We also reject the defendant's claim that the circumstances surrounding his prior murder conviction should be considered as a mitigating circumstance because the victim experienced "a pleasurable erotic experience" before he died. While it is clear that the Utah murder did not display the depravity present in the case at bar, the trial court did not find the circumstances of the earlier murder to be mitigating and neither do we.

Id.

The Court agrees that the trial court carried out its constitutional obligation to consider all of the evidence offered in mitigation, including the four factors presented in Claim N. As discussed above, the trial court made specific on-the-record findings with respect to three of the four factors. (ROA-PCR 225 at 3-5; RT 8/29/85 at 6-10.) The court also stated that it

considered all of the mitigation arguments and evidence presented in Petitioner's memorandum and at the sentencing hearing. (ROA-PCR 225 at 3.) Moreover, in its discussion of the prior conviction as an aggravating factor, the court again noted that it "has carefully reviewed all of the testimony and exhibits admitted at the sentencing hearing." (Id. at 2.) The evidence referred to included testimony offered by two witnesses in support of Petitioner's argument that the circumstances of the 1968 murder – i.e., the fact that the victim's death appeared to be the accidental result of auto-erotic asphyxiation which occurred during a consensual sexual encounter – warranted consideration as a mitigating factor. (RT 8/22/85 at 28-33, 39-40, 44-47.) Because the trial court considered all of Petitioner's arguments and evidence in support of mitigation – a key component of which was Petitioner's characterization of the 1968 murder – it is clear that in sentencing Petitioner, the court did consider the circumstances surrounding the prior conviction. The court simply disagreed with Petitioner regarding the import of such information. However, the fact that the court found the evidence "inadequate to justify leniency ... did not violate the constitution." Ortiz, 149 F.3d at 943; see Eddings, 455 at 114-15, 102 S.Ct. 869.

The record indicates, and the Court finds, that the trial court considered all of the mitigation evidence presented by Petitioner, thereby fulfilling the directive set forth in Lockett and Eddings. See Parker, 498 U.S. at 318, 111 S.Ct. 731. In addition, the Court finds that the decision of the Arizona Supreme Court rejecting allegations (3) and (4) was neither contrary to nor an

unreasonable application of clearly established federal law. Petitioner is not entitled to relief on Claim N.

3. Claim Q.

In Claim Q, Petitioner contends that the Arizona Supreme Court, in its independent review of his sentence, failed to consider and give effect to the mitigating circumstances found by the trial court. (Dkt. 82 at 77.) Petitioner raised this claim in his preliminary PCR petition. (ROA-PCR 245 at 12-13.) The court denied the claim as procedurally precluded. (M.E.3/27/96.) Because there is no state court ruling on the merits of this claim, the Court will perform a de novo review. Pirtle, 313 F.3d at 1167

The Arizona Supreme Court detailed the results of its independent review of Petitioner's sentence:

> As is required at this point, we conduct our own independent examination of the record to determine whether the death penalty is properly imposed. State v. Vickers, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981). We note, however, that in 1981 we considered and affirmed the defendant's death penalty. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982).
>
> Our review of the record satisfies us that the state proved that the defendant committed the murder for pecuniary gain. The state also properly established an additional aggravating circumstance arising out of the defendant's prior

> murder conviction. Thus, we find, without question, that there were at least two aggravating circumstances in the present case.
>
> We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency. The evidence shows that the defendant strangled to death a 74-year-old man in order to obtain his vehicle and money. At the time the defendant committed this act, he had previously been found criminally responsible for another person's death. The death penalty is appropriate in this case.

Schad III, 163 Ariz. at 421, 788 P.2d at 1172.

Petitioner's argument is based upon the fact that the Arizona Supreme Court, in carrying out its independent review of the sentence, discussed only one mitigating factor, Petitioner's exemplary behavior in prison. (Dkt. 82 at 77-80.) According to Petitioner, the supreme court's failure to discuss additional mitigating circumstances, which had been found or considered and rejected by the trial court, indicated that the court excluded those circumstances from consideration, thereby violating Lockett and Eddings. (Id. at 80.)

In carrying out its habeas review, this Court presumes that "state courts follow the law, even when they fail to so indicate." Jeffers, 38 F.3d at 415; see

Poland, 117 F.3d at 1101. The law required the Arizona Supreme Court to undertake an independent review of Petitioner's sentence, and the court explicitly stated that it carried out "an independent review of the record to determine if the death sentence is properly imposed." Schad III, 163 Ariz. at 421, 788 P.2d at 1172. Nothing in the record overcomes that presumption.

A review of the Arizona Supreme Court's decision also supports a finding that the court undertook a sufficient independent review of the mitigation information contained in the record. For example, the supreme court did not consider and reject only a single mitigating factor; along with Petitioner's good conduct while incarcerated and his potential for rehabilitation, the court addressed Petitioner's arguments regarding the circumstances surrounding the prior murder conviction. Schad III, 163 Ariz. at 421, 788 P.2d at 1172. In doing so, the court directly addressed the two arguments regarding mitigation that Petitioner specifically raised on direct appeal. (Appellant's Opening Brief at 43.) In addition, as Respondents observe, the Arizona Supreme Court acknowledged that "the trial court found several mitigating factors." Id. at 417, 788 P.2d at 1168. In concluding its review of Petitioner's sentence, the supreme court referred to multiple mitigating factors when it stated that "the mitigating circumstances are insufficient to outweigh a single aggravating factor." Id. at 421, 788 P.2d at 1172 (emphasis added). It is clear that the Arizona Supreme Court was aware of the entirety of the mitigation evidence considered by the trial court; by independently reviewing that record, the court necessarily considered such evidence. Contrary to

Petitioner's argument, the supreme court did not exclude any mitigating evidence from its consideration.

Given the presumption that the supreme court followed the law, the court's explicit acknowledgment of its duty to perform an independent review of the record, the court's specific discussion of the mitigating factors raised by Petitioner on direct appeal, and the court's recognition that the trial court had found a number of mitigating circumstances, the Court concludes that the Arizona Supreme Court's review of Petitioner's sentence did not violate Petitioner's rights under Lockett and Eddings. See Moormann, 426 F.3d at 1055; Jeffers, 38 F.3d at 418. Therefore, Petitioner is not entitled to relief on Claim Q.

Claim O: **Petitioner was sentenced in violation of his Due Process and Eighth Amendment rights because the presentence report contained inaccurate information.**

Petitioner alleges that the trial court relied on materially inaccurate information when it sentenced him to death. (Dkt. 82 at 80.) This information was contained in the presentence report, which, according to Petitioner, indicated that his record included three prior felonies, committed from 1959 to 1963, that were in fact misdemeanors. (Id.) Petitioner raised this claim in his supplemental PCR petition. (ROA-PCR 319 at 9-10.) The court rejected the claim. (M.E. 6/21/96 at 2-3.)

A defendant who requests re-sentencing due to the use of inaccurate information at the original sentencing must show both that information before the

sentencing court was inaccurate and that the court relied on the inaccurate information in formulating the sentence. United States v. Tucker, 404 U.S. 443, 447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948); see Lechner v. Frank, 341 F.3d 635, 638-39 (7th Cir. 2003) (sentencing court demonstrates actual reliance on misinformation in determining sentence when it gives explicit attention to it, bases its sentence at least in part on the information, or gives specific consideration to the information before imposing sentence).

As Respondents note, the trial court relied on only one prior felony as an aggravating factor in sentencing Petitioner, the Utah second-degree murder conviction. In sentencing Petitioner to death, the court did not and could not consider the other felonies contained in the presentence investigation because those offenses did not constitute statutory aggravating factors, which, under Arizona's death penalty scheme, are the only factors the court was permitted to consider. In its special verdict, the court gave no indication that it considered the information Petitioner now asserts is inaccurate. (M.E. 8/29/85; ROA-PCR 225.) Because the court did not rely on inaccurate information in sentencing Petitioner, Petitioner is not entitled to relief on Claim O.

Claim P: Ineffective assistance of counsel-sentencing.

Petitioner alleges that counsel was ineffective at sentencing for failing to investigate Petitioner's family background and to present corroborating evidence concerning the nature and effects of his abusive

childhood .'kt. 82 at 88.) Petitioner further contends that post-conviction counsel were diligent in developing this claim, and this Court should review the newly developed information he has attached to his habeas filings and hold an evidentiary hearing. (Id. at 89-91.) Respondents counter that the sentencing-stage performance of trial counsel was neither deficient nor prejudicial because counsel did present the mitigating information available at the time of sentencing, and that post-conviction counsel were not diligent in developing the facts Petitioner now proffers. (Dkt. 91 at 63-66.)

1. Background.

There is no dispute that trial counsel argued forcefully against a death sentence for Petitioner and that in doing so he raised, among other issues, the mitigating effect of Petitioner's traumatic upbringing.[25] Counsel filed a thirty-nine-page sentencing memorandum that included a section outlining the "emotional harm" caused by Petitioner's abusive childhood. (ROA-PCR 222 at 31-32.) The memorandum referenced the presentence report, which contained a somewhat more detailed account of Petitioner's "stormy childhood" and its impact on Petitioner's

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[25] In his memorandum and at the presentencing hearing, trial counsel emphasized Petitioner's good character, exemplary prison record, and potential for rehabilitation, factors which the trial court accepted as mitigating circumstances. (ROA-PCR 225 at 4). Petitioner also challenged the use of his prior murder conviction as an aggravating circumstance. (ROA-PCR 222 at 2-8; RT 8/22/85 at 28-34, 43-48.)

emotional health and development. (ROA-PCR 223 at 3-4.) The report indicated that Petitioner's father was psychologically unstable and an abusive alcoholic who beat Petitioner with his fists; that Petitioner would accept beatings from his father in order to protect other family members; that at age seventeen he attempted to have his father committed but after his mother withdrew her support from this course of action his father beat him severely; that his father prevented him from engaging socially with others; and that these experiences caused Petitioner to suppress his feelings and spend time away from home, until he left home at age eighteen. (Id.) In the report, however, Petitioner indicated that he did not have any emotional problems. (Id. at 6.) Similarly, at the presentencing hearing, Dr. Bendheim alluded to Petitioner's "deprive[]" childhood (RT 8/25/85 at 51), but did not indicate that any mental health issues had resulted from that deprivation. Having reviewed this information, the trial court concluded that Petitioner's "unfortunate childhood" was not a "persuasive mitigating circumstance." (ROA-PCR 225 at 4.)

On December 16, 1991, attorney Denise Young filed a preliminary PCR petition. (ROA-PCR 245.) The petition did not include a claim that trial counsel's performance at sentencing was ineffective.[26] (Id.)

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[26] The petition included a claim that the trial court violated Petitioner's rights by rejecting his traumatic upbringing as a mitigating factor. (Id. at 11.) The petition accurately observed that, "Undisputed mitigation evidence was presented that [petitioner] was raised in an abusive, unstable, and alcoholic (Continued)

Petitioner was subsequently represented by attorney John Williams. (M.E.12/19/91). The court ordered Mr. Williams to file a supplemental petition by February 18, 1992 (Id.), but subsequently granted each of Mr. Williams's motions to extend that deadline (M.E. 2/14/92, 3/18/92, 4/17/92, 8/6/92, 10/14/92). On November 3, 1992, Mr. Williams was replaced by attorney Michael Chezem. (M.E.11/3/92.) The court also granted Mr Chezem's motions to extend the time for filing a supplemental PCR petition. (M.E.1/5/93, 2/2/93, 4/14/93, 5/14/93, 6/28/93, 7/30/93, 8/19/93, 9/27/93, 10/25/93, 11/29/93, 12/27/93, 2/1/94.) Mr. Chezem filed a motion seeking the appointment of an investigator, Palmer Investigative Services. (ROA-PCR 263.) On July 30, 1993, the court granted the motion and provided funds for the investigator. (ROA-PCR 264.)

On January 31, 1994, Mr. Chezem withdrew from his representation of Petitioner and was replaced by attorney Rhonda Repp. (ROA-PCR 276.) On February 1, 1994, the court granted Ms. Repp's request for authorization of further investigative services. (M.E.2/1/94.) Ms. Repp moved to extend the deadline for filling a supplemental PCR petition on the grounds that she and the court-appointed investigator had not completed their investigation and located all potential witnesses; the court granted the motions. (M.E.2/16/94, 3/18/94, 4/22/94, 5/24/94, 6/23/94, 7/22/94, 8/30/94,

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family and that petitioner was beaten severely by his father and forbidden to interact with other children." (Id.)

9/27/94, 10/31/94, 11/21/94, 12/28/94, 1/18/95, 2/21/95, 4/20/95.)

On March 28, 1995, more than a year after her appointment, Ms. Repp sought the services of a mitigation expert, Holly Wake (ROA-PCR 301-2.) On July 6, 1995, the court authorized Ms. Wake's appointment. (ROA-PCR 309.)

Ms. Repp then requested additional extensions of the filing deadline for the supplemental petition, which the court again allowed. (M.E.5/22/95, 6/20/95, 7/21/95, 8/22/95, 9/20/95.) On September 20, 1995, the court ruled that no further continuances would be granted. (M.E.9/20/95.) In total, the court granted thirty-four extensions for post-conviction counsel; seventeen of these were requested by Ms. Repp. The court denied Ms. Repp's request for contact visits between Petitioner and Ms. Wake (M.E.11/20/95) and her motion for disclosure of Petitioner's Department of Corrections file (M.E.12/27/95).

On September 26, 1995, the State filed a motion to dismiss the petition with prejudice on the grounds that the amended petition was untimely. (ROA-PCR 315.) In its order denying the motion, the court recounted the history of the PCR proceedings and observed that, "Certainly, during the course of all this time some of the delays were occasioned by extraordinary circumstances." (M.E. 11/20/95 at 2.)

On October 19, 1995, Ms. Repp filed a supplemental PCR petition, alleging, on the basis of "newly discovered" mitigation evidence, that trial

counsel's performance at sentencing had been ineffective. (ROA-PCR 319 at 6-12.) Ms. Repp also sought an evidentiary hearing. (Id. at 1.)

Attached to the supplemental PCR petition was an affidavit prepared by Ms. Wake. (Id., Ex. 2.) In the affidavit, Ms. Wake indicated that she had interviewed Petitioner for four hours and that, based on the information he provided, she concluded that the presentence report "failed to adequately address the seriousness of the abuse [Petitioner] suffered as a child and teenager." (Id. at 3.) However, Ms. Wake's discussion of the new information received from Petitioner added very little to the details set out in the presentence report. (Id.) Ms. Wake reported that Petitioner had "forgotten many of the details surrounding his younger years." (Id. at 2.) Ms. Wake also indicated that she wished to review additional records and interview family members; she acknowledged, however, that in the past Petitioner's family members had proven reluctant to cooperate and difficult to locate.[27] (Id. at 3.)

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[27] In a report dated December 3, 1993, and submitted to Mr. Chezem, Petitioner's investigator indicated that she had located Petitioner's mother in New York state. (Dkt.91, Ex. D.) According to the investigator:

> I contacted Mrs. Hughes, and she stated that she would not tell me where Mr. Schad's siblings were, or how to get in touch with them. All she would say is that Edward was a good boy when he was at home, growing up, and then she hung up on me. I feel that the rest of the family would be hard to find, and even if we did succeed, I do not believe that they would cooperate with us.

(Continued)

On June 21, 1996, without holding a hearing, the court denied the claims presented in the supplemental petition, including the claim that counsel was ineffective at sentencing. The court explained:

> [D]efendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist. If the mitigation evidence then turns out to be favorable to the defendant, resentencing might be appropriate. Defendant is simply suggesting that it would be a good thing to delve further into defendant's prior convictions and to try once again to talk to family members, etc., etc. Defendant is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not know at sentencing time and how that might effect [sic] sentencing. This claim has no merit.

(M.E. 6/21/96 at 2-3.)

On July 8, 1996, Ms. Repp filed a motion for rehearing in which she stated, without elaboration, that "mitigation evidence available, but not presented, at [Petitioner's] sentencing hearing would have resulted in a life sentence." (ROA-PCR 341 at 1.) The motion again requested an evidentiary hearing but did not indicate what witnesses would be called or what

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(Id. at 2.)

the nature of the testimony would be. (Id. at 2.) Ms. Repp also filed another declaration by Ms. Wake. (ROA-PCR 342.) Ms. Wake repeated her characterization of trial counsel's mitigation effort as inadequate and described the information in the presentence report as "limited and incomplete." (Id. at 3.) She indicated that "[t]hrough complete interviews, additional information concerning [Petitioner's] abuse has been obtained," but again failed to specify what that information was and did not attach any supporting affidavits or reports. (Id.) The court summarily denied the motion for a rehearing. (M.E.7/24/96.)

2. New information.

In support of Claim P, Petitioner has submitted a number of exhibits that contain information never presented to the state courts. These include an affidavit, dated October 5, 1999, in which Petitioner's mother, Mabel Hughes, recounts her experiences with Petitioner's father, who had been wounded and held as a prisoner of war while serving in Europe during World War II. (Dkt.82, Ex. 4.) According to Mrs. Hughes, Mr. Schad's behavior deteriorated when he returned from overseas; he drank excessively, could not hold a job, and physically abused her; at one point he was committed to a psychiatric ward. (Id.) Mrs. Hughes' affidavit only briefly touches upon Petitioner's childhood and his relationship with his father; she attests that Mr. Schad was "really hard on" Petitioner when he was a small child and that Mr. Schad did not want her to show Petitioner any affection. (Id. at ¶ 28.) She also states that Petitioner had friends when he

was growing up but did not bring them to the house. (Id. at ¶ 29.)

Petitioner has also submitted an affidavit from Lili Deputa, an investigator with the Federal Public Defender's Office in Tucson. (Dkt.82, Ex. 5.) The affidavit is dated July 10, 2000, and recounts a conversation between Ms. Deputa and Petitioner's sister, Susan, that took place in September 1998. (Id. at 1.) According to Ms. Deputa, Ms. Schad described growing up in a poor household where gifts and new clothes were rare; for Christmas the children received one or two presents "at the most." (Id. at 2.) Ms. Deputa reports that Ms. Schad characterized the family as secretive and the parents as "cold and distant" toward the children and toward each other. (Id. at 1-2.) According to Ms. Schad, the parents showed no emotional or physical affection for the children. (Id. at 2.) Ms. Schad also acknowledged her father's severe alcohol problem. (Id.) Ms. Deputa's affidavit also includes information obtained from an interview with Petitioner's aunt, Mr. Schad's sister, who discussed the religious upbringing of her generation of Schads, Mr. Schad's war experiences, and the fact that Petitioner's infant sister died suddenly and her twin brother had a bad eye which went undiagnosed until he started school. (Id. at 4-5.)

Additional new information, provided in support of Claim P, includes employment records of Petitioner's mother (Dkt. 82, Ex. 11), and the Veterans' Administration records of Petitioner's father (id., Ex. 13) and younger brother, Thomas Schad (id., Ex. 12). According to Petitioner, his mother's records indicate

that she was frequently injured and that the treatment for those injuries, which included the prescription of narcotics, affected her parenting ability. (Dkt. 82 at 86-87.) The V.A. records of Petitioner's father show that he returned from overseas suffering from a disabling anxiety disorder and that his mental condition and behavior worsened over the years. (Dkt. 82, Ex. 13.) As documented in the records, however, the most extreme episodes occurred when Petitioner was an adult and out of the home. (Id.) The V.A. records of Thomas Schad, a wounded Viet Nam veteran, indicate that he suffered from post-traumatic stress disorder and alcoholism. (Id., Ex. 12.) Various reports in these records document Thomas Schad's family history; he reported that his father was an alcoholic and had suffered a nervous break-down in 1970; he also indicated that his father was "strict but fair" with respect to discipline, and that his mother, a housewife, was "gentler." (Id.)

In his reply to Respondents' brief on the merits, Petitioner included an affidavit prepared by Dr. Leslie Lebowitz, a clinical psychologist. (Dkt. 98, Ex. K.) The affidavit, dated May 29, 2001, focuses on the mental health of Petitioner's parents. (Id. at 3.) Based upon the sources of information discussed above, and her own interview of the eighty-year-old Mrs. Hughes in 1999, Dr. Lebowitz concluded that Petitioner's family was "profoundly dysfunctional," that his father was "completely disabled" as a parent due to his severe post-traumatic stress disorder and alcoholism, and that his mother was so "disengaged" from her children as to be guilty of criminal neglect. (Id. at 20-21.) According to Dr. Lebowitz, the violence and neglect experienced

by the Schad children left them at a "tremendous disadvantage when faced with the challenges of adult life." (Id. at 22.)

On August 26, 2004, Petitioner filed a [redacted] of supplemental authority. (Dkt.111.) Petitioner attached to the notice a ninety-two-page affidavit prepared by a clinical psychologist, Charles Stanislaw. (Id., Attach.) Dr. Stanislaw prepared a detailed "social history" of Petitioner in support of Petitioner's claim of IAC at sentencing. (Id.) Respondents moved to strike the notice of supplemental authority (Dkt.112); the Court granted the motion with respect to the Stanislaw affidavit (Dkt.114). Petitioner then filed a motion to expand the record (Dkt.115), which Respondents opposed (Dkt.116). The Court denied the motion without prejudice, indicating with respect to the motion to expand the record and the other new information Petitioner has presented, that when the Court addressed the merits of Claim P, it would also make a determination whether Petitioner had diligently attempted to develop the factual basis of the claim in state court. (Dkt.120.)

In his affidavit, Dr. Stanislaw repeats the family background discussed above and offers his opinions concerning the mental health of Petitioner's parents and the effect of their condition, and of other social and economic factors, on Petitioner's psychological development. (Dkt.111, Attach.) He also offers a biography that chronicles Petitioner's education, military service, and criminal activities, and theorizes about the cause of Petitioner's erratic and self-defeating behaviors. (Id.) Dr. Stanislaw concludes that

Petitioner "exhibited many symptoms indicative of a severe and chronic illness. His history of abuse, neglect, and abandonment cannot be ruled out as playing a significant factor in [his] psychiatric and behavioral functioning as an adult." (Id. at 90.)

3. Analysis.

The Court concludes that Petitioner has failed to show that the PCR court's denial of his claim of IAC at sentencing was an unreasonable application of federal law. The Court further finds, with respect to Petitioner's attempt to introduce factual information that was not presented to the state court, Petitioner was not diligent in developing these facts. See infra, pp. 82-84. Moreover, the Court finds that even if Petitioner had been diligent and the new materials were properly before the Court, Claim P is without merit.

The right to effective assistance of counsel applies not just to the guilt phase, but "with equal force at the penalty phase of a bifurcated capital trial." Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002) (quoting Clabourne v. Lewis, 64 F.3d at 1378). Trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Hayes v. Woodford, 301 F.3d 1054, 1066 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 691). To determine whether the investigation was reasonable, the court

"must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." Wiggins v. Smith, 539 U.S. at 523 (citation and quotation marks omitted). As the Supreme Court recently reiterated, "In judging the defense's investigation, as in applying Strickland generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made and by giving a 'heavy measure of deference to counsel's judgments.'" Rompilla v. Beard, 545 U.S. 374, 381, 125 S.Ct. 2456, 2462 (2005) (quoting Strickland, 466 U.S. at 689, 691).

With respect to prejudice, the Strickland Court explained that "[w]hen a defendant challenges a death sentence ... the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In Wiggins, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. at 534. The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced in the habeas proceeding." Id. at 536 (quoting Williams v. Taylor, 529 U.S. at 397-98).

Petitioner has not demonstrated that trial counsel's performance at sentencing was either deficient or prejudicial. Instead, the Court finds that

trial counsel presented a strategically sound case in mitigation and that the information Petitioner now contends should have been presented is not of sufficient weight to create a reasonable probability that, if it had been presented, the trial court would have reached a different sentencing determination.

The focus of trial counsel's attempt to secure a life sentence for Petitioner was the argument that Petitioner, despite the offenses for which he had been convicted, was a changed man who had become "an outstanding prisoner and an outstanding asset to the prison community."[28] (ROA-PCR 222 at 28.) The trial court agreed with counsel's arguments and found that Petitioner's "good, stable character" and status as a "model prisoner" constituted mitigating circumstances. (ROA-PCR 225 at 4.) Petitioner now bases his argument that trial counsel was ineffective on counsel's failure to offer information that is

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[28] As noted previously, another focus of counsel's sentencing-stage strategy was to attack the validity of Petitioner's prior conviction as an aggravating factor. In implementing this strategy, counsel presented the testimony of Stephen Love, an official with the Utah Board of Pardons. (RT 8/22/85 at 22-36.) Mr. Love testified that he believed that Petitioner was wrongfully convicted of murder because the victim's death was accidental and that Petitioner was not a cold-blooded killer. (Id. at 34.) Counsel also elicited substantial testimony from Dr. Bendheim in support of his position that the prior conviction did not qualify as an aggravating circumstance and that Petitioner was not a violent individual. (Id. at 45-49.) This testimony complemented the evidence indicating that Petitioner had a sound character and was worthy of a life sentence.

inconsistent with this presentation of Petitioner as a man who has triumphed over adversity.

For example, as Respondents note in their opposition to Petitioner's motion to expand the record (Dkt. 116 at 12), Dr. Stanislaw's characterization of Petitioner's character and mental health stands in stark contrast to the arguments and information trial counsel presented on his behalf at sentencing. Dr. Stanislaw opines that Petitioner is mentally ill and "has exhibited symptoms of paranoia, anxiety, and mania, and his presentation is complicated by his history of trauma." (Dkt. 111, Attach. at 91.) He "conceals his psychopathology." (Id.) He "displays impoverished speech." (Id.) He "has a pattern of repeating astonishingly self-defeating behaviors." (Id.) According to Dr. Stanislaw, "In addition to manic symptoms, [Petitioner] displays classic signs of chronic depression including a foreshortened sense of future. When not defending against depression with an energized, overly optimistic or manic state, hopelessness and helplessness are evident and appear to overwhelm him by disorganizing his thoughts and speech patterns." (Id.)

At sentencing, counsel presented evidence intended to show Petitioner as a man whose character and capabilities would enable him to benefit society. The evidence included letters and testimony in support of Petitioner from pastors and church members who indicated that Petitioner was a kind, caring, intelligent, articulate, accomplished individual who had "changed his life" and overcome his "miserable childhood." (See ROA-PCR 223; RT 8/22/85 at 80-89,

101-23, 132-53.) In contrast to Dr. Stanislaw's characterization of Petitioner as irremediably damaged by childhood trauma, these individuals portrayed Petitioner as a "solid citizen," "very stable," "in control," "positive," "never despondent," motivated and focused, and an ideal candidate for rehabilitation. (Id.) Dr. Bendheim and John Powers, a social worker at the Utah prison where Petitioner was incarcerated, offered similar testimony. Dr. Bendheim testified that although Petitioner had a "miserable childhood" and was an "unloved child," he had since rehabilitated himself. (RT 8/22/85 at 48, 51). Mr. Powers testified that Petitioner had made "great strides" in dealing with his issues; Petitioner's conduct in prison, supported by the results of psychological tests, indicated to Mr. Powers that his release on parole in 1978 was appropriate. (Id. at 59, 66.) According to Dr. Stanislaw, however, the qualities and accomplishments testified to by these witnesses and noted by Petitioner's supporters-Petitioner's positive influence on other inmates, for instance, and his educational achievements-are nothing more than a "display of inflated self-esteem, grandiosity, and an inflated sense of one's own significance." (Dkt. 111, Attach. at 77.)

Trial counsel's performance cannot be considered deficient for failing to present these opposing versions of Petitioner – i.e., as both rehabilitated and exemplifying a number of personal strengths and virtues which could be used to benefit others, and as an unstable and disoriented individual incapable of

completing a task.[29] Circuit courts have recognized that mental health evidence is a "double-edged sword," and that counsel's decision not to present such information can "exemplifly] ... reasonable strategic judgment," particularly when counsel focuses his mitigation argument on the defendant's character or amenability to rehabilitation. Truesdale v. Moore, 142 F.3d 749, 754 (4th Cir. 1998) (counsel exercised reasonable strategic judgment by "steer[ing] away from" evidence of organic brain dysfunction, "calculating that it would not help portray [Petitioner] as normal and capable of rehabilitation"); see Glock v. Moore, 195 F.3d 625, 636-40 (11th Cir. 1999) (counsel not ineffective for failing to develop evidence of petitioner's post-traumatic stress disorder related to childhood abuse because, inter alia, presenting such information would have made it "less likely ... the court would have found that he was a good character for rehabilitation"); Bonin v. Calderon, 59 F.3d 815, 834-35 (9th Cir.1995) (reasonable for counsel not to further investigate client's psychiatric condition when counsel made tactical decision to rely on "institutional adjustment" as primary mitigation theory); cf. Gerlaugh, 129 F.3d at 1034 (lay witness testimony regarding petitioner's good character and behavior conflicted with expert testimony that he was a sociopath). Trial counsel's argument that Petitioner was worthy of a sentence less than death based upon a prospective consideration of his positive attributes

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[29] This is true particularly because Petitioner also maintains that the state courts did not place sufficient weight on the positive aspects of Petitioner's present character and state of mind. (Dkt. 82 at 66-80.) See supra, pp. 47-50.

represented a reasonable strategy in mitigation. Counsel's performance was not deficient under Strickland.

The Court further finds that Petitioner has not satisfied Strickland's prejudice prong. Petitioner claims that trial counsel failed to investigate and develop "readily available" information about Petitioner's dysfunctional childhood. (Dkt. 82 at 88.) According to Petitioner, if counsel had located and presented this mitigation evidence, it would have corroborated the information that the trial court heard and rejected. (Id.) The Court disagrees with this characterization of the new material.

The affidavits submitted by family members and psychologists repeat, rather than corroborate or elaborate on, the specific details of abuse included in the presentence report. Despite the volume of additional materials subsequently filed, the information in the presentence report remains the most detailed account of the abuse suffered by Petitioner at the hands of his father. The Court notes, for example, that Dr. Stanislaw, who interviewed Petitioner during two contact visits, does not report any additional information concerning Mr. Schad's violence against Petitioner; instead, when documenting the abuse Petitioner suffered, Dr. Stanislaw frequently relies on the details contained in the presentence report. (Dkt. 111, Attach. at 43, 46, 49-50, 90.)

Much of the remainder of the new material emphasizes the dysfunctional nature of Petitioner's childhood household. The affidavits of Drs. Lebowitz

and Stanislaw include detailed biographies of Petitioner's parents and the affiants' opinions regarding the mental condition of Petitioner's mother as well as his father. Much of this information is speculative and of limited relevance. For example, Petitioner now contends that his mother's parenting ability was impaired because she was often under the influence of narcotics. (Dkt. 82 at 86-87.) This theory appears to be based entirely on a review of Mrs. Hughes's employment records, which date from 1952 to 1981. (Dkt. 98, Ex. K at 20.) In her affidavit, Dr. Lebowitz observes that Mrs. Hughes was prescribed phenobarbital for nervousness resulting from family issues and on numerous occasions received prescriptions for narcotic painkillers. (Dkt. 98, Ex. K at 20.) The records show, however, that Mrs. Hughes was first prescribed phenobarbital in 1959, when Petitioner was seventeen years old, and received her first prescription for a painkiller in 1961. (Dkt.82, Ex. 11.) Based upon this information, there is no evidence that Mrs. Hughes's functioning was impaired by the abuse of narcotics during Petitioner's childhood and adolescence.

Furthermore, the relevance of information concerning Petitioner's troubled childhood and the parenting deficiencies of his mother and father must be taken in context with the fact that Petitioner was thirty-six years old when he killed Mr. Grove, and had been out of the parental home for some eighteen years. Prior to 1978, Petitioner had served two terms in the Army and had lived overseas. (ROA-PCR 223 at 7.) While serving his sentence for the 1968 murder he had established a record as a model prisoner and gained

the trust of prison officials who recommended parole on the grounds that Petitioner had addressed his psychological issues and did not represent a threat to society. (RT 8/22/85 at 59-67.) Petitioner's age and life experience attenuates any causal connection between Petitioner's dysfunctional childhood and the 1978 murder. See State v. Djerf, 191 Ariz. 583, 598, 959 P.2d 1274, 1289 (1998) ("Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior"); State v. Newell, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (lack of a "nexus" between the mitigating factor and the crime "may be considered in assessing the quality and strength of the mitigation evidence"). For these reasons, Petitioner was not prejudiced by counsel's failure to present additional information describing the nature of Petitioner's traumatic childhood.

Finally, while the Court notes that the new materials, particularly the affidavit of Dr. Stanislaw, offer a more elaborate explanation of the psychological effect of Petitioner's childhood experiences, this information is either cumulative or, as discussed above, contradictory to the portrait of Petitioner that trial counsel presented at sentencing. The presentence report presented uncontradicted evidence from a credible source that Petitioner experienced severe childhood abuse and that the abuse affected his social and emotional development. (ROA-PCR 223 at 3-4.) The trial court considered this evidence but found it "unpersuasive" in terms of mitigation and ultimately sentenced Petitioner to death. (ROA 225 at 4.) Petitioner has not shown a reasonable probability that

the court's decision would have been different if trial counsel had presented additional evidence expanding the scope of Petitioner's claim of childhood abuse and neglect and analyzing Petitioner as "self-defeating" and "mentally ill." (Dkt. 111, Attach. at 90, 91.) The Court does not find such an approach was more likely to have achieved success than the strategy trial counsel actually employed.

The trial court denied Petitioner's claim that counsel was ineffective at sentencing. (M.E.6/21/96.) In support of this claim, Petitioner has submitted additional factual materials that were not presented to the state court. Despite Petitioner's failure to develop these facts in state court, the Court has considered these materials and concludes that the trial court's denial of Petitioner's sentencing-stage IAC claim was not an unreasonable application of clearly established federal law as set forth in Strickland. Petitioner is not entitled to relief on Claim P.

Claim R: **The Arizona Supreme Court's failure to conduct a proper proportionality review violated Petitioner's right to due process.**

Petitioner argues that the proportionality review conducted in his case "fell below the most minimal standards of due process-without reliable sources of information, without standards, without rules, and without notice of the issues, and even without the personal participation of the Justices who were supposed to be conducting it." (Dkt. 82 at 91.) Petitioner raised this claim in his PCR petition (ROA-

PCR 245 at 13-14), and the court PCR court denied it as procedurally precluded (M.E.3/27/96).

There is no federal constitutional right to proportionality review of a death sentence. McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (citing Pulley v. Harris, 465 U.S. 37, 43-44 (1984)). Nevertheless, at the time of Petitioner's direct appeal, it was the stated practice of the Arizona Supreme Court to undertake a proportionality review of all capital sentences,[30] and the court did so with respect to Petitioner's sentence:

> After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. Richmond, 136 Ariz. at 321, 666 P.2d at 66. We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above "the norm" of first degree murders, or the defendant's background places him above "the norm" of first degree murderers. State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. State v. McCall,

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[30] The state court discontinued proportionality reviews in 1992. State v. Salazar, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992).

139 Ariz. 147, 162, 677 P.2d 920, 935 (1983), cert. denied, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984).

There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066, cert. denied, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984); State v. Blazak, 131 Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982); State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). We have also upheld the death penalty in cases where the defendant had prior convictions punishable by life imprisonment. State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); State v. Bracy, 145 Ariz. 520, 703 P.2d 464 (1985), cert. denied, 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984).

In contrast, we have reduced a defendant's death penalty sentence to life imprisonment where we have found insufficient evidence to support the aggravating circumstances. State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985). We have also reduced the defendant's sentence where the defendant was mentally impaired, State v. Graham, 135 Ariz. 209, 660 P.2d 460

(1983), or very young when he committed the crime. State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982).

Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

Schad III, 163 Ariz. 422-23, 788 P.2d at 1173-74.

While conceding that there is no constitutional right to proportionality review, Petitioner argues that the Arizona Supreme Court, by instituting the practice of reviewing the proportionality of death sentences, must carry out the practice in accord with the Due Process Clause by providing notice, an opportunity to be heard, and objective guidelines. (Dkt. 82 at 91-93.)

The Ninth Circuit rejected this argument in Ceja v. Stewart, 97 F.3d 1246, 1252 (9th Cir. 1996). In Ceja, the petitioner argued that the Arizona Supreme Court had created a liberty interest in proportionality review, which the court violated when it failed to undertake such a review of his death sentence. Id. The Ninth Circuit denied the claim, holding that the interest implicated by proportionality review-the "substantive right to be free from a disproportionate

sentence" was protected by the application of "adequately narrowed aggravating circumstance[s]." Id. In the present case, in contrast to Ceja, the supreme court did conduct a proportionality review, in addition to applying Arizona's properly narrowed statutory aggravating factors.

Petitioner has not shown that the supreme court carried out its proportionality analysis in bad faith. See Walton v. Arizona, 497 U.S. 639, 655-56 (1990), overruled on other grounds by Ring v. Arizona, 536 U.S. 584 (2002) (if a proportionality review was conducted in good faith, the Constitution does not require a federal court to look behind the state court's conclusion). It is not a proper function of this Court to review a state court's decision on proportionality. Lewis v. Jeffers, 497 U.S. at 779 (court of appeals erred in conducting a de novo, case-by-case comparison of state cases); see also LaGrand, 133 F.3d at 1263; Gerlaugh, 129 F.3d at 1044-45; Martinez-Villareal v. Lewis, 80 F.3d 1301, 1308-09 (9th Cir. 1996). Petitioner is not entitled to relief on Claim R.

Claim U: Inadequate standard for weighing aggravating and mitigating standards.

In its procedural status order the Court indicated that it would consider the merits of the following properly exhausted allegation of Claim U: that Arizona's death penalty statute and case law fail to establish an objective standard to guide the discretion of the sentencing judge in weighing aggravating and mitigating factors and determining whether to impose a sentence of death. (Dkt. 59 at 16-

17.) Petitioner's brief fails to address this claim (see Dkt. 82), and the Court finds it meritless.

The Arizona Supreme Court addressed and rejected this claim on direct appeal. Schad III, 163 Ariz. at 422, 788 P.2d at 1173. This decision was neither contrary to nor an unreasonable application of clearly established federal law. Courts have consistently upheld the validity of Arizona's death penalty scheme. See Lewis v. Jeffers, 497 U.S. at 774-77; Walton v. Arizona, 497 U.S. at 649-56; Smith v. Stewart, 140 F.3d 1263, 1272 (9th Cir.1998); Woratzeck v. Stewart, 97 F.3d at 335; Chaney v. Lewis, 801 F.2d 1191, 1195 (9th Cir.1986). Petitioner is not entitled to relief on Claim U.

Claim AA: Ineffectiveness of appellate counsel.

Petitioner alleges that appellate counsel was ineffective in violation of Petitioner's rights under the Sixth and Fourteenth Amendments. (Dkt. 82 at 95-106.) Without addressing Petitioner's specific allegations of appellate counsel's IAC, the PCR court denied this claim, finding that counsel's decision not to raise certain issues on appeal was "strategic" and that Petitioner had failed to show that counsel's performance was either deficient or prejudicial. (M.E. 6/21/96 at 2.)

The Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985). A claim of ineffective assistance of appellate counsel is reviewed according to the standard

set out in Strickland. See Miller v. Keeney, 882 F.2d 1428, 1433-34 (9th Cir.1989). Under Strickland, Petitioner must show that counsel's appellate advocacy fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's deficient performance, Petitioner would have prevailed on appeal. Smith v. Robbins, 528 U.S. 259, 285-86 (2000); see Miller, 882 F.2d at 1434 n.9 (citing Strickland, 466 U.S. at 688, 694).

"A failure to raise untenable issues on appeal does not fall below the Strickland standard." Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002); see also Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel could not be found to have rendered ineffective assistance for failing to raise issues that "are without merit"); Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985). Moreover, appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a petitioner. Miller, 882 F.2d at 1434 n.10 (citing Jones v. Barnes, 463 U.S. 745, 751-54 (1983)); see Smith v. Stewart, 140 F.3d at 1274 n. 4 (counsel not required to file "kitchen-sink briefs" because doing so "is not necessary, and is not even particularly good appellate advocacy"). Courts have frequently observed, as the PCR court did here (M.E. 6/26/96 at 2), that the "weeding out of weaker issues is ... one of the hallmarks of effective appellate advocacy." Miller, 882 F.2d at 1434; see Smith v. Murray, 477 U.S. 527, 536 (1986). Therefore, even if appellate counsel declines to raise weak issues, counsel will likely remain above an objective standard of competence and will have caused no prejudice. Id.

In addition to satisfying both prongs of the Strickland standard, under the AEDPA Petitioner must make the additional showing that the PCR court's denial of his claims of ineffective assistance of appellate counsel was contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

On direct appeal, appellate counsel raised thirteen issues. (Appellant's Opening Brief.) In his merits brief, Petitioner claims that "appellate counsel failed to provide ... vigorous and effective advocacy in five areas." (Id. at 96.) Applying the principles discussed above, the Court concludes that the underlying claims lack merit and therefore the Court rejects Petitioner's contention that appellate counsel's failure to raise the issues that follow constituted IAC.

1. Right to present a defense.

As discussed above, trial counsel moved for the appointment of Dr. Bendheim to perform a "psychiatric autopsy" of Mr. Grove. (ROA-PCR 156.) The trial court denied the motion. (M.E.6/14/85.) Counsel also sought to introduce Mr. Grove's medical records. (RT 6/27/85 at 1320-21.) The trial court granted the state's motion to exclude the records. (Id. at 1323-24.) Appellate counsel did not challenge these rulings on direct appeal.

To satisfy the prejudice prong of Strickland, Petitioner must show that if appellate counsel had challenged the trial court's ruling with respect to evidence of the victim's mental health, there was a

reasonable probability that he would have prevailed on appeal. Miller, 882 F.2d at 1433-34. Petitioner cannot satisfy this burden, because the Arizona Supreme Court has ruled that the type of information trial counsel sought to put before the jury is not admissible. In State v. Montijo, 160 Ariz. 576, 577-78, 774 P.2d 1366, 1367-68 (1989), the defendant, convicted of negligent homicide, argued on appeal that the trial court erred in precluding expert testimony regarding a "psychiatric autopsy" of the victim, which the defendant had sought to introduce to support his theory that he had acted in self-defense.[31] The supreme court upheld the trial court's ruling on the grounds that "the proposed testimony was not a proper subject of expert testimony." Id. at 580, 774 P.2d at 1370. The court noted that its precedent "distinguished between general information about a character or behavioral trait and a particularized opinion about how that trait was manifested in the case at trial." Id. The court then explained that "[t]he psychiatric autopsy in this case far transgressed this line. It sought to inform the trier not only about decedent's character *but what decedent did and why he did it on the night of his death.* It was properly rejected." Id. (emphasis added).

The information trial counsel sought to introduce at Petitioner's trial through Dr. Bendheim's

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[31] This "autopsy" report purported to show that the victim was a violent, troubled, sexually aggressive substance abuser with a low IQ, "the type of person who dies prematurely by provoking his own death." Montijo, 160 Ariz. at 579, 774 P.2d at 1369.

research and testimony similarly constituted an effort to show what Mr. Grove did at the moment of his death-committed suicide-and why he did it. The information was not admissible under Arizona Supreme Court precedent. Therefore, the trial court's decision to exclude the evidence was correct, and appellate counsel's decision not to raise a meritless issue on appeal cannot form the basis for a claim of IAC.

Petitioner relies on Beaver v. Hamby, 587 F.Supp. 88 (M.D.Tenn. 1983), to support his argument that psychiatric autopsies are admissible and therefore appellate counsel was deficient for failing to appeal the trial court's rulings to the contrary. (Dkts. 82 at 98, 98 at 76.) In Beaver, however, the district court did nothing more than offer a brief allusion to the fact that at trial the defense presented testimony by an expert who had performed a psychiatric autopsy of the victim; because such evidence had been placed before the jury, the district court rejected the habeas petitioner's challenge to the trial court's exclusion of additional evidence concerning the victim's state of mind. 587 at 91. The district court did not consider, let alone endorse, the propriety of admitting the results of a psychiatric autopsy. Its holding does nothing to advance Petitioner's IAC claim.

2. Removal of jurors.

he trial court, sua sponte, excused six jurors on the grounds that they were hearing-impaired. (RT 6/18/85 at 84-85, 92, 94, 108-09.) Petitioner argues that the court did not make further inquiries or pursue

alternate means of accommodating the jurors. (Dkt. 82 at 100-01.) The court also dismissed a juror, Larry Reed, after learning that his siblings had experienced legal troubles. (RT 6/19/85 at 210.) The court interviewed Mr. Reed, who indicated that, based upon the unfair manner in which the authorities had treated his relatives, he would "probably go for the defendant" and would "go one sided." (Id. at 209.) Petitioner argues that the court's "summary" removal of Mr. Reed "denied Petitioner the opportunity to inquire into what Mr. Reed's statements actually meant." (Dkt. 82 at 101.) Trial counsel did not object to the court's dismissal of these jurors, and he approved of the panel at the conclusion of voir dire. (RT 6/19/85 at 218.)

Petitioner contends that the court's dismissal of these jurors violated his right to a jury composed of a fair cross-section of the community and his right to a fair and impartial jury, and that appellate counsel's failure to raise the issue on appeal constituted IAC. (Dkt. 82 at 102.)

A review of the Arizona Supreme Court's holdings in this area indicates that appellate counsel did not perform ineffectively by failing to pursue this issue on appeal. The supreme court has held that while a defendant is entitled to a fair and impartial jury, "he is not entitled to be tried by any particular jury; therefore, unless the record affirmatively shows that such a fair and impartial jury was not secured, the conviction must be affirmed." State v. Arnett, 119 Ariz. 38, 50, 579 P.2d 542, 554 (1978); see State v. Doerr, 193 Ariz. 56, 65, 969 P.2d 1168, 1177 (1998). In Arnett, the court further explained that "the matter of

excusing jurors is committed to the sound discretion of the trial judge, and in the absence of a clear and prejudicial abuse of that discretion, his action will not be disturbed on appeal; this is so even where the judge acts on his own motion." Id.; see State v. Dickens, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996). Finally, the Arnett court noted that "appellant waived any objection in this regard, both by failing to object at the time of the excusal, and by expressly approving the panel at the conclusion of voir dire." Id. (citations omitted); see State v. Milke, 177 Ariz. 118, 122, 865 P.2d 779, 783 (1993).

Nothing in the record affirmatively shows that Petitioner was denied a fair and impartial jury or that the trial court clearly and prejudicially abused its discretion in excusing the jurors. These facts, together with counsel's waiver of any objections, render untenable any argument that Petitioner's rights were violated by the trial court's dismissal of the jurors. Because appellate counsel is not obligated to raise untenable issues, his failure to do so here does not constitute IAC.

3. Jury instructions.

Petitioner claims that counsel erred by failing to raise as an appellate issue an alleged error in the jury instructions. (Dkt. 82 at 102-03.) The trial court instructed the jury that the malice element of murder could be inferred from the use of a deadly weapon; the

court did not provide a definition of "deadly weapon."[32] (RT 6/27/85 at 1403-04.) Defense counsel did not object to this portion of the instruction. (RT 6/27/85 at 1338.) According to Petitioner, the failure to provide a definition of "deadly weapon" was an error that violated his right to due process, a fair trial, and a reliable sentencing determination. (Dkt. 82 at 102.) The Court disagrees.

First, it is noted that the instruction provided by the trial court comported with the murder instruction approved on numerous occasions by the Arizona Supreme Court. See, e.g., State v. Bishop, 144 Ariz. 521, 522-23, 698 P.2d 1240, 1241-42 (1985); State v. Lujan, 124 Ariz. 365, 370-71, 604 P.2d 629, 634-34 (1979).

Moreover, because defense counsel did not object at trial, the issue was waived on appeal unless the court's failure to define "deadly weapon" constituted fundamental error. State v. Valles, 162 Ariz. 1, 6, 780 P.2d 1049, 1054 (1989); see State v. Zaragoza, 135

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[32] The court instructed the jury, in relevant part:

> Murder is the unlawful killing of a human being with malice. The thing that distinguishes murder from all other killings is malice. There are two kinds of malice. A person has one kind of malice when he deliberately intends to kill. If you determine that the defendant used a deadly weapon in the killing, you may find malice. If you determine that the defendant had no considerable provocation for the killing, you may find malice.

(RT 6/27/85 at 1403.)

Ariz. 63, 66, 659 P.2d 22, 25 (1983) (noting that convictions are rarely overturned on the basis of an improper instruction to which no objection was made at trial) (citing Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). In Valles, the Arizona Supreme Court explained that "a court need not define every phrase or word used in the instructions" and that "[w]hen the words are used in their ordinary sense and are commonly understood by those familiar with the English language, the court need not define those terms." Id. The court then found that "deadly weapon" was a term with a commonly understood meaning, noting that "the statutory definition of deadly weapon and the common definition are essentially the same." Id. at 6-7, 780 P.2d at 1054-55. The supreme court concluded, therefore, that the trial court's failure to define "deadly weapon" in its jury instructions did not constitute fundamental error. Id.

Appellant had no duty to raise a meritless challenge to the murder instruction on direct appeal; therefore, his failure to do so did not constitute IAC.

4. Right to be present.

Petitioner claims that counsel was ineffective for failing to raise as an appellate issue the fact that Petitioner was not present when defense counsel moved for a mistrial during an in-chambers meeting and when the court and counsel settled the jury instructions. (Dkt. 82 at 103-04.)

"[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is

critical to its outcome if his presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 745 (1987). As the Arizona Supreme Court explained, however, a defendant's right to be present extends "only to those proceedings in open court 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" State v. Christensen, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) (citation omitted); see State v. Dann, 205 Ariz. 557, 571, 74 P.3d 231, 245 (2003) (noting that "the right does not extend to in-chambers pretrial conferences ... and various other conferences characterized as relating only to the resolution of questions of law") (citation omitted).

At defense counsel's request, an in-chambers conference occurred on the morning of June 21, 1985, prior to the day's trial proceedings. At the meeting, defense counsel, citing improprieties in a previous witness's testimony, moved for a mistrial and raised several other evidentiary issues. (RT 6/21/85 at 612-23.) Counsel waived Petitioner's presence. (Id. at 623.)

Petitioner argues that counsel could not validly waive Petitioner's right to be present at the meeting. (Dkts. 82 at 103-04, 98 at 82.) The Court disagrees. In State v. Collins, 133 Ariz. 20, 23, 648 P.2d 135, 138 (1982), the Arizona Supreme Court held that counsel may waive a defendant's right to be present at trial proceedings, even those involving issues that are not "wholly legal" in nature, and that "the trial court may rely on counsel's waiver without requiring personal waiver by the defendant." The Court also finds that the proceeding involved the resolution of purely legal

matters and therefore did not affect Petitioner's right to be present.

On June 27, 1985, the court and counsel gathered outside of Petitioner's presence "to make a record ... on the [jury] instructions." (RT 6/27/85 at 1335.) Defense counsel did not comment on or object to Petitioner's absence during the brief meeting. (Id. at 1335-44.)

The Court finds that this proceeding also involved wholly legal matters. At the brief meeting, the judge informed counsel which instructions he would read to the jury and counsel made a record of their objections. (Id.) Petitioner "could have contributed nothing" to this legal discussion and cannot show "that his presence *951 would have made any difference." State v. Schackart, 190 Ariz. 238, 255, 947 P.2d 315, 332 (1997); see Stincer, 482 U.S. at 745. Therefore, Petitioner's absence from the meeting did not constitute a violation of his constitutional rights.

The argument that Petitioner's right to be present was violated in these instances is without merit. Appellate counsel's failure to raise the issue did not constitute IAC.

5. **Cruel and unusual punishment.**

Petitioner contends that appellate counsel was ineffective because he failed to argue that Petitioner's death sentence constituted cruel and unusual punishment. (Dkt. 82 at 105-06.) As the basis for this proposed argument, Petitioner cites the lack of

evidence of his guilt and the strength of the evidence in mitigation. (Id.)

This claim is without merit. On direct appeal, counsel raised eleven separate claims attacking Petitioner's death sentence. (Appellant's Opening Brief.) These included a challenge to the trial court's findings in aggravation and mitigation (id. at 22-34) and claims that Arizona's death penalty scheme constitutes cruel and unusual punishment in violation of the Eighth Amendment (id. at 35-38, 55). The Arizona Supreme Court rejected these claims. Schad III, 163 Ariz. at 417-23, 788 P.2d at 1168-74.

Petitioner has failed to demonstrate that appellate counsel was ineffective for failing to raise an additional challenge to Petitioner's sentence on the grounds that his conviction was supported by insufficient evidence, especially given the fact that the Arizona Supreme Court had already held that the evidence was sufficient to support a murder conviction. Schad I, 129 Ariz. at 572, 633 P.2d at 381; see Schad III, 163 Ariz. at 420-21, 982 P.2d at 1171-72 (discussing sufficiency of evidence supporting the pecuniary gain aggravating factor).

The Court concludes that Petitioner has not shown that the performance of appellate counsel was either deficient or prejudicial. Therefore, the PCR court's denial of Petitioner's claim of appellate counsel IAC was neither contrary to nor an unreasonable application of federal law. Petitioner is not entitled to relief on Claim AA.

EVIDENTIARY DEVELOPMENT

1. Background.

Petitioner seeks to present, through an evidentiary hearing and the introduction of various affidavits, evidence that was not considered by the state court. Petitioner requests an evidentiary hearing with respect to Claims A, I, J, P, R, and AA.[33] (See Dkt. 82.) As noted above, Petitioner also filed a motion seeking to expand the record, attached to which was Dr. Stanislaw's affidavit. (Dkt.115.) In addition, Petitioner's merits brief and reply include affidavits containing factual material that was not presented to the state court. (Dkts.82, 98.) Petitioner contends that he is entitled to an evidentiary hearing and to the consideration of the new materials because he pursued the factual basis of the relevant claims through the exercise of due diligence in state court. The Court disagrees.

In evaluating Petitioner's requests, the Court must apply the relevant provisions of 28 U.S.C. § 2254(e)(2):

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that·

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[33] The Court has already addressed and denied Petitioner's request for an evidentiary hearing with respect to Claim B. Supra, pp. 19-21.

(A) the claim relies on –

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[34]

Section 2254(e)(2) similarly limits a petitioner's ability to present new evidence through a motion to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases.[35] See Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir. 2005) (holding that the conditions of § 2254(e)(2) generally apply to petitioners seeking relief based on new

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[34] Petitioner does not argue, pursuant to § 2254(e)(2)(A)(i), that a new retroactive rule of constitutional law applies to his claims.

[35] Rule 7 authorizes a federal habeas court to expand the record to include additional material relevant to the determination of the merits of a petitioner's claims. "The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath, to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record." Rule 7(b), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.

evidence, even when they do not seek an evidentiary hearing) (citing Holland v. Jackson, 542 U.S. 649, 652-53 (2004) (per curiam)).

As interpreted by the United States Supreme Court, the restrictions of subsection (e)(2) apply only if the failure to develop a claim's factual basis is due to a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432 (2000). "The purpose of the fault component of 'failed' is to ensure the prisoner undertakes his own diligent search for evidence." Id. at 435, 120 S.Ct. 1479. The Court found that this rule served the AEDPA's goal of furthering comity in that "federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." Id.; see also Cardwell v. Netherland, 971 F.Supp. 997, 1008 (E.D. Va. 1997) ("Ordinarily, a § 2254 petition is limited to the factual record developed in state court proceedings"), aff'd Cardwell v. Greene, 152 F.3d 331 (4th Cir.1998), overruled on other grounds, Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000). Thus, subsection (e)(2) allows factual development when a petitioner diligently attempts to develop the factual basis of a claim in state court and is "thwarted, for example, by the conduct of another or by happenstance was denied the opportunity to do so." Williams, 529 U.S. at 432; see Baja v. Ducharme, 187 F.3d 1075,1078-79 (9th Cir. 1999).

In compliance with § 2254(e)(2), when the factual basis for a particular claim has not been fully developed in state court, the first question for a district

court in evaluating whether to grant an evidentiary hearing is whether the petitioner was diligent in attempting to develop its factual basis. See Baja, 187 F.3d at 1078 (quoting Cardwell, 152 F.3d at 337). The Supreme Court has set an objective standard for determining "diligence": whether the petitioner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." Williams, 529 U.S. at 435. For example, when there is information in the record that would alert a reasonable attorney to the existence and importance of certain evidence, the attorney "fails" to develop the factual record if he does not make reasonable efforts to investigate and present the evidence to the state court. See id. at 438-40, 120 S.Ct. 1479 (counsel lacked diligence because he was on notice of possibly material evidence and conducted only a cursory investigation); Alley v. Bell, 307 F.3d 380, 390-91 (6th Cir. 2002) (lack of diligence because petitioner knew of and raised claims of judicial bias and jury irregularities in state court, but failed to investigate all the factual grounds for such claims).

Absent unusual circumstances, diligence requires "that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Williams, 529 U.S. at 437; see Bragg v. Galaza, 242 F.3d 1082, 1090 (9th Cir.2001), amended on denial of reh'g, 253 F.3d 1150 (9th Cir. 2001) ("inactions show[ed] insufficient diligence" on ineffective counsel claim where petitioner did not request an evidentiary hearing and brought claim only on appeal rather than in a collateral proceeding). However, the mere request for an evidentiary hearing

may not be sufficient to establish diligence if a reasonable person would have taken additional steps. See Dowthitt v. Johnson, 230 F.3d 733, 758 (5th Cir. 2000) (petitioner requested hearing but was not diligent because he failed to present affidavits of family members that were easily obtained without court order and with minimal expense); see also Koste v. Dormire, 345 F.3d 974, 985-86 (8th Cir. 2003) (lack of diligence despite hearing request because petitioner made no effort to develop the record or assert any facts to support claim that his counsel was ineffective for knowing of and failing to investigate his psychiatric condition), cert. denied, 541 U.S. 1011 (2004). If an evidentiary hearing is requested, a petitioner's inability to persuade a state court to conduct such a hearing does not in itself demonstrate lack of diligence. See Cardwell, 152 F.3d at 338.

If the Court determines that Petitioner has not been diligent in establishing the factual basis for his claims in state court, the Court may not conduct a hearing unless Petitioner satisfies one of the narrow exceptions set forth in § 2254(e)(2). These exceptions do not apply to Petitioner's claims; Petitioner does not argue that the factual predicate of the claims could not have been previously discovered or that the facts underlying the claims are sufficient to establish by clear and convincing evidence that, but for the constitutional error, no rational factfinder would have found him guilty. Therefore, if Petitioner cannot show that he pursued the claims with due diligence in state court, he is not entitled to a hearing or to expansion of the record.

Finally, with respect t, claims that were diligently developed in state court, and which are not subject to the strictures of § 2254(e)(2), a petitioner is entitled to an evidentiary hearing on a claim where the facts are in dispute if he has alleged facts that, if proven, would entitle him to relief, and he did not receive a full and fair evidentiary hearing in state court. Silva v. Woodford, 279 F.3d at 853.

The Court has previously described the history of Petitioner's collateral attack on his conviction in state court. See supra at pp. 54-57. Based upon that record, the Court concludes that Petitioner was not diligent in developing the factual bases of his claims, despite being afforded an opportunity to do so during collateral proceedings that stretched over a period of nearly five years.

2. Motions discussion.

Applying the principles discussed above, the Court evaluates Petitioner's requests for an evidentiary hearing and expansion of the record.

Claims A and I: In his supplemental PCR petition, Petitioner argued that newly discovered evidence, in the form of an affidavit by Duncan's ex-wife, supported his contention that Duncan was acting as an agent of the police when he spoke with Petitioner. (ROA-PCR 319, Ex. 2.) The Court has resolved this aspect of Claim A by determining that Petitioner's right to counsel had not attached; therefore, additional evidence regarding Duncan's alleged status as a police agent is not relevant.

With respect to the remainder of Claim A and Claim I, alleging a Brady violation and prosecutorial misconduct, Petitioner seeks an evidentiary hearing "at which [he] can discover and present all the undisclosed incentives provided by the prosecution to Duncan." (Dkt. 82 at 38.) Petitioner did nothing to develop the factual predicate of this claim in state court. He did not raise this claim on direct appeal, and his PCR petitions do not include an allegation that the State failed to disclose impeachment materials regarding Duncan. Therefore, Petitioner did not exercise due diligence in developing the claim in state court, and he is precluded from obtaining an evidentiary hearing before this Court.

Claim J: Claim J alleges two areas of IAC by trial counsel: (1) failure to locate Duncan's wife and (2) failure to move for reconsideration of the court's refusal to appoint Dr. Bendheim to examine the victim's mental health, along with a failure to make a proper proffer of the victim's medical records. (Dkt. 82 at 38-50.)

In his preliminary PCR petition, Petitioner raised the issue of ineffectiveness with respect to Dr. Bendheim's appointment and the victim's medical records. (ROA-PCR 245 at 9-10.) He sought an evidentiary hearing, but presented no affidavits or other information in support of the factual basis of the claim. (Id.) In his supplemental PCR petition, he argued that trial counsel was ineffective for failing to locate Duncan's ex-wife (ROA-PCR 319 at 9-10); he moved for an evidentiary hearing and presented an

affidavit from Sprayberry (Id., Ex. 2). In a supplemental filing he included an affidavit from his investigator indicating that she had been able to locate Sprayberry with no difficulty. (ROA-PCR 337.) Finally, to supplement his motion for rehearing, Petitioner presented an affidavit from trial counsel, who indicated that he had been unable to locate Sprayberry and that his failure to call her as a witness was not a strategic decision. (ROA-PCR 344.) The state court considered this information and rejected it as a basis for a claim of IAC. (M.E. 6/21/96 at 2.)

Petitioner has not offered additional information to support this aspect of Claim J. Therefore, based upon this record, even a finding that Petitioner was diligent in developing the factual predicate of the claim would not entitle him to an evidentiary hearing. To the extent that there is a dispute regarding any issue relevant to trial counsel's performance, the Court has already determined that Petitioner has not demonstrated prejudice under Strickland; therefore, he has not alleged facts that, if true, would entitle him to relief. Silva, 279 F.3d at 853. See supra, pp. 27-28.

In support of the second contention in Claim J, Petitioner has attached to his reply brief an affidavit by Dr. George Woods, who attests that the psychiatric autopsy is a valuable and accepted forensic technique and opines that such a procedure, if performed by Dr. Bendheim, would have supported the theory that the victim had committed suicide. (Dkt.98, Ex. C.) Petitioner's failure to develop this type of information in the state court proceedings precludes this Court from granting*955 him an evidentiary hearing on this

aspect of Claim J. The Court further observes that the information contained in the affidavit, which dates from June 2001, is at best tangentially relevant to the issue of whether counsel performed in an objectively unreasonable and prejudicial manner when he failed to persuade the trial court to appoint Dr. Bendheim for the purpose of performing a psychiatric autopsy of Mr. Grove. See supra, pp. 920-922.

Claim P: Petitioner seeks an evidentiary hearing on his claim of IAC at sentencing. (Dkt. 82 at 91.) Petitioner supports his request for a hearing, and the merits of Claim P, with the new factual material already outlined by the Court, which includes information obtained from Petitioner's relatives (Dkt. 82, Exs.4, 5), the medical records of Petitioner's father (id., Ex. 13), and affidavits filed by Drs. Lebowitz (Dkt.98, Ex. K) and Stanislaw (Dkt.111, Attach.). Petitioner asserts that he did not fail to develop this evidence in state court and that he has alleged facts that, if true, entitle him to relief. (Dkt. 82 at 91.) The Court disagrees.

Petitioner knew the factual basis for his claims at the time of the extensive PCR proceedings. He has not shown that the evidence he now presents was not available during that period. Petitioner contends, however, that any inadequacies in his effort to develop a record before the state court were not attributable to a lack of diligence on his part. Instead, Petitioner alleges that "[PCR] counsel requested time, funds, and a hearing at which to investigate, develop and present this evidence" but "were denied all of that." (Dkt. 98 at 70.) As the Court has previously recounted, PCR

counsel requested and were granted thirty-four motions to extend, resulting in a delay of nearly four years between the filing of the preliminary PCR petition and the supplement. This fact sufficiently addresses the contention that the trial court denied Petitioner's request for time to develop his claims.[36]

Petitioner does not indicate which request for funding the trial court denied and how such a denial impeded his ability to develop his claims.[37] To the contrary, the record demonstrates that the state court facilitated Petitioner's investigation and development of evidence supporting his claims. PCR counsel successfully moved for the appointment of an investigator and a mitigation specialist. (ROA-PCR 264, 309.) The investigator had been working on the case for more than two years prior to the filing of the supplemental PCR petition. While it is true that the mitigation specialist was appointed on July 6, 1995, only three months before the filing of the supplemental petition, Ms. Repp had been assigned to the case for well over a year before she moved for Ms. Wake's

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[36] Petitioner complains that "chaos" resulted from the fact that he was represented by multiple attorneys during the PCR proceedings. (Dkt. 119 at 6.) However, Ms. Repp alone had twenty-one months, during which she moved for and was granted seventeen continuances, to file a supplemental petition.

[37] The only motions denied were for contact visits between Ms. Wake and Petitioner (M.E.11/20/95) and the request for disclosure of Petitioner's DOC file (M.E.12/27/95). Although the former motion was denied, Ms. Wake indicated that she interviewed Petitioner twice. (ROA-PCR 319, Ex. 3 at 2.)

appointment in March 1995. (ROA-PCR 301-2.) Moreover, by the time Ms. Wake filed her supplemental affidavit of July 7, 1996, she had been working on Petitioner's behalf for more than a year, but she was still unable to offer more than conclusory claims regarding the existence of additional, unspecified, mitigation evidence. (ROA-PCR 342.)

The trial court denied Petitioner's claims without holding an evidentiary hearing as requested by Petitioner. (M.E.6/21/96, 7/24/96.) The Court finds, however, that the state court's refusal to hold an evidentiary hearing was attributable to Petitioner's failure to develop the factual record. See Koste, 345 F.3d at 986. A reasonable attorney, provided with the time and funding to which PCR counsel had access, would have presented affidavits and records in support of the argument that Petitioner's traumatic family background was not adequately explored by trial counsel. See Dowthitt, 230 F.3d at 757. With nothing before it but Ms. Wake's affidavits and their allusions to additional mitigating information, the trial court was not unreasonable in denying the claim without holding an evidentiary hearing.

Because Petitioner did not "undertake[] his own diligent search for evidence" in state court, Williams, 529 U.S. at 435, he is not entitled to an evidentiary hearing. Based upon the same analysis, the Court again denies Petitioner's motion to expand the record. See Holland v. Jackson, 542 U.S. at 652-53.

Claim R: Petitioner asserts that "he is entitled to an evidentiary hearing where he can further develop

the facts on the 'process' the Arizona Supreme Court used to conduct this [i.e., proportionality] review generally, and specifically in this case." (Dkt. 82 at 95.) Petitioner raised the claim of constitutionally inadequate proportionality review in his preliminary PCR petition (ROA-PCR at 13-16), but did nothing to develop the claim in state court. Moreover, as the Court noted in its Order denying discovery of documents related to this Claim (Dkt. 75 at 7) and discussed with respect to Claim R, such information is not relevant to the Court's evaluation of the supreme court's proportionality review. Petitioner is not entitled to an evidentiary hearing on this issue.

Claim AA: Petitioner raised the issue of ineffective appellate counsel in his preliminary PCR petition. (ROA-PCR at 16-17.) The claim consisted of the conclusory assertion that "Petitioner's appellate counsel failed, inter alia, to raise the claims set forth in this petition." (Id. at 16.)

As discussed above, a claim of appellate IAC requires a showing that counsel's failure to raise certain issues on appeal fell below professional norms of performance and was therefore constitutionally deficient. Petitioner did not attempt to make such a showing in state court. He did not, for example, investigate the basis of appellate counsel's decision not to raise the issues which form the basis of this claim. Petitioner's lack of diligence in state court prohibits the Court from holding an evidentiary hearing.

CONCLUSION

The Court finds that Petitioner has failed to establish entitlement to habeas relief on any of his claims. The Court further finds that an evidentiary hearing in this matter is neither warranted nor required.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt.27) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the Clerk of Court send a courtesy copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona 85007-3329.

Dated this 28th day of September, 2006

s/_____
Roslyn O. Silver
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA.

Edward Harold SCHAD,	No. CV-97-2577-PHX-ROS
Petitioner,	DEATH PENALTY CASE
v.	**ORDER**
Dora SCHRIRO, et al.,	
Respondents.	

Before the Court is Petitioner's Motion to Alter or Amend Judgment. (Dkt.124.) In an Order dated September 29, 2006, the Court denied Petitioner's amended habeas corpus petition. (Dkts.121, 122.) The Court simultaneously issued a Certificate of Appealability ("COA") with respect to Claims A and P. (Dkt.123.) In the present motion, Petitioner challenges the procedure by which the Court issued the COA and the Court's resolution of Claims L and AA(1).

1. Issuance of COA

Petitioner contends that the Court does not have the authority to issue a COA *sua sponte,* prior to an application being made by Petitioner. The Court disagrees.

As set forth in 28 U.S.C. § 2253(c)(1), an appeal may not be taken from a final order in a habeas proceeding "[u]nless a circuit justice or judge issues a certificate of appealability." Rule 22(b)(1) of the Federal Rules of Appellate Procedure provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court ... the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

A COA may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 & n. 4 (1983)).

Petitioner has cited no authority to support the proposition that the § 2253(c) or Rule 22(b) requires the district court to await a petitioner's application before issuing a COA. To the contrary, case law consistently supports the district court's authority to grant or deny a COA *sua sponte*. *See Castro v. United States,* 310 F.3d 900, 901-03 (6th Cir. 2002) (per curiam) ("a district judge may issue or deny a COA when he rules on a habeas motion"); *Deleon v. Strack,* 234 F.3d 84, 87 (2d Cir.2000) (upholding district court's decision to issue a COA *sua sponte); Alexander v. Johnson,* 211 F .3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny COA *sua sponte.*").

The analysis set forth in these cases persuades this Court that Petitioner's position is without merit. In *Castro,* the Sixth Circuit rejected the argument, also raised by Petitioner here, that a "premature," *sua sponte,* ruling on a COA deprives a petitioner of an opportunity to argue that he is entitled to a certificate pursuant to the standard set forth in § 2253(c) and *Barefoot. Id.* at 903. The court noted that Rule 22(b)(1) requires a district court to decide whether to issue a COA in situations where a petitioner has filed a notice of appeal, whether or not the petitioner also filed a motion and brief in support of a COA. *Id.* "Thus the structure of Rule 22(b) clearly contemplates the decision on issuance of COAs by both district and court of appeals judges in circumstances where the applicant for a writ of habeas corpus has not filed a motion for a COA." *Id.*

Moreover, in issuing a COA this Court had before it all of the information necessary to evaluate

the strength of each of Petitioner's allegations that his rights were violated. As the Fifth Circuit noted in *Alexander*:

> Arguably, the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.

211 F.3d at 898.

This Court agrees. Based on its experience with motions for COAs, the Court determined that additional briefing by Petitioner, who is represented by court-appointed counsel, would be unlikely to provide information not already present in the extensive pleadings filed in this case and would thus constitute an unwarranted drain on scarce judicial resources. More significantly, in issuing the COA in this case, the Court was aware of and applied the appropriate standards to assess which of Petitioner's claims was suitable for a COA.

Petitioner's motion requesting the Court to alter or amend its judgment to permit Petitioner to apply for a COA and submit briefing in favor of the application is therefore denied.

2. Reconsideration of Claims L and AA(1)

Petitioner requests that the Court alter or amend its order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. A motion under Rule 59(e) is in essence a motion for reconsideration. Motions for reconsideration are disfavored and appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon,* 197 F.3d 1253, 1255 (9th Cir. 1999) (per curiam); *see School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir.1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs, *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.,* 841 F.2d 918, 925-926 (9th Cir.1988), nor is it the time to ask the court to "rethink what it has already thought through," *United States v. Rezzonico,* 32 F.Supp.2d 1112, 1116 (D.Ariz.1998) (quotation omitted).

In support of his motion, Petitioner repeats the arguments that the Court has already considered. Because the gravamen of Petitioner's arguments is simply a demand that the Court rethink decisions it has already made, the motion must be denied.

In asking the Court to reconsider its denial of Claim L, Petitioner repeats the allegation that his due process rights were violated by the Arizona Supreme Court's determination that his prior conviction for second-degree murder constituted an aggravating circumstance. In its Order denying the amended habeas petition, the Court found that Petitioner was

not entitled to relief on Claim L because (1) the Arizona Supreme Court construed its own law in finding that the prior conviction constituted an aggravating factor, and that construction was binding on this Court, *Horton v. Mayle,* 408 F.3d 570, 576 (9th Cir. 2005); (2) Petitioner was precluded from challenging the constitutionality of his prior conviction because the conviction was no longer open to direct or collateral attack, *Lackawanna County Dist. Attorney v. Coss,* 532 U.S. 394, 403-04 (2001); and (3) Petitioner was not prejudiced by the supreme court's consideration of the prior conviction as an aggravating factor because the court determined that the pecuniary gain factor had also been proved and it alone outweighed the totality of the mitigating evidence, *Brecht v. Abrahamson,* 507 U .S. 619, 637 (1993); *Bullington v. Missouri,* 451 U.S. 430 (1981); *Poland v. Arizona,* 476 U.S. 147, 154 (1986).

In the present motion, Petitioner restates arguments that this Court has already rejected. The arguments do not address the above-cited bases of the Court's decision, and fail to persuade the Court to alter its analysis.

Similarly, with respect to Claim AA(1), alleging ineffective assistance of appellate counsel, Petitioner repeats the arguments raised in his merits brief. Petitioner again contends that counsel's performance was deficient and prejudicial because he failed to raise as an appellate issue the trial court's exclusion of evidence regarding the victim's mental health. Petitioner asserts that such evidence, in the form of the victim's medical records and the presentation of a so-called psychiatric autopsy, would have suggested

that the seventy-four-year-old victim experienced a depression so severe that while traveling across country to visit a relative, he stopped his car by the side of the road and strangled himself to death (immediately after which Petitioner came into possession of his vehicle and wallet). According to Petitioner, evidence of the victim's mental state was admissible at trial; its erroneous exclusions prevented Petitioner from presenting a defense; and appellate counsel's failure to raise the issue constituted ineffective assistance of counsel.

This Court again finds that Petitioner was not prejudiced by counsel's failure to raise the issue because the evidence was not admissible under Arizona law. *See State v. Montijo,* 160 Ariz. 576, 774 P.2d 1366 (Ariz.App.1989). Contrary to Petitioner's arguments, it is clear that Petitioner sought to introduce expert testimony or records regarding the victim's mental health not as "general information about a character or behavioral trait" (i.e., depression and suicidal tendencies); instead, the evidence took the form of "a particularized opinion about how that trait was manifested in the case at trial" (i.e., the victim was not murdered but killed himself). *Id.* at 580, 774 P.2d at 1370. Because the evidence at issue was inadmissible, appellate counsel was not ineffective for failing to challenge its exclusion on direct appeal.

For the reasons set forth above,

IT IS HEREBY ORDERED DENYING Petitioner's Motion to Alter or Amend Judgment. (Dkt.124.)

DATED this 26th day of January, 2007.

s/_____
Roslyn O. Silver
United States District Judge

OPPOSITION BRIEF

No. 12-1084

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,
Director, Arizona Department of Corrections, et al.,
Movant,

v.

EDWARD HAROLD SCHAD,
Respondent.

SCHAD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In state post-conviction proceedings, Ed Schad's post-conviction attorney never presented a claim that Schad's trial counsel was ineffective at sentencing for failing to present mitigating mental health evidence showing that Schad's father was mentally ill, that Schad's mother was mentally disturbed and addicted, and that as a result "at the time of the crime Schad was suffering from "several major mental disorders" specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others. ER 540." *Schad v. Ryan*, No 07-99005, Slip op, at 10 (9th Cir. Feb. 26, 2013). As petitioner has repeatedly asserted in this litigation, it was the fault of post-conviction counsel that an ineffectiveness claim predicated upon such evidence was never properly presented to the state courts. According to petitioner, there is an "extensive state court record demonstrating [post-conviction counsel's] lack of diligence." *Ryan v. Schad*, U.S. No. 10-305, Petition For Writ Of Certiorari, p. 25.

When Ed Schad finally received effective counsel in federal habeas corpus proceedings, he first presented an ineffectiveness-at-sentencing claim predicated upon sentencing counsel's failure to present this extensive mitigating mental health evidence. Petitioner told the District Court that Schad's presentation of new evidence in federal habeas created a new, previously-unadjudicated claim, because it "places the claim in a significantly different evidentiary posture in federal court, ***violating the exhaustion requirement***." R. 116, p. 4 (Opposition To Motion To Expand Record). Petitioner reiterated that Schad's federal habeas claim was "in a

significantly different evidentiary posture than it was in before the state court, thereby *violating the fair presentation requirement*." *Id.*, p. 9. The district court thus refused to consider such evidence, and on appeal, petitioner *again* successfully maintained that Schad's claim could not be adjudicated based upon the unexhausted mental health evidence first presented in federal court.[1] The court of appeals then only considered the ineffectiveness-at-sentencing claim that had been adjudicated by the state court, and denied relief on that claim – not the new claim first presented in federal habeas based on the unexhausted mental health evidence.

That Schad's new ineffectiveness claim is procedurally defaulted should come as no surprise to petitioner, which told the district court that there could be no federal review of the claim because of the exhaustion requirement. The court of appeals here has so held. The vacated panel decision in *Dickens v. Ryan*, 688 F.3d 1054, 1070 (9th Cir. 2012) came to a similar conclusion under identical circumstances. And the Fourth, Fifth, and Tenth Circuits have likewise concluded that when, as here, a federal habeas petitioner presents an ineffectiveness-at-sentencing claim predicated on substantial new evidence never considered by the state court, the petitioner's claim is unexhausted and/or defaulted. *Moses v. Branker*, 2007 U.S.App.Lexis 24750 (4th Cir. 2007); *Kunkle v. Dretke*, 352 F.3d 980, 987-988 (5th Cir. 2003); *Fairchild v. Workman*, 579 F.3d 1134, 1148-1151 (10th Cir.

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[1]On appeal to the Ninth Circuit, petitioner complained that Schad had improperly included the evidence not presented to the State Court in his record excerpts. See Motion to Strike Opening Brief and Excerpts. As a result, Schad was required to file two sets of excerpts with the second (and more voluminous set) being the evidence not presented to the State Court.

2009)(when new evidence changed legal landscape of sentencing ineffectiveness claim, claim was not adjudicated in state court, and new claim was presented in federal court).

After the court of appeals ruled - *but before Ed Schad ever petitioned for certiorari and while the appellate mandate remained stayed pending a petition for writ of certiorari* - this Court decided *Martinez v. Ryan*, 566 U.S. ___ (2012). Schad promptly moved for a remand in the court of appeals in light of *Martinez*, maintaining that he could now receive full consideration of his mental-health-based mitigation claim under *Martinez*, because the ineffectiveness of post-conviction counsel provided "cause" for his failure to exhaust and his default. The court of appeals, apparently misapprehending the significance of *Martinez*, summarily denied Schad's motion to remand, but the appellate mandate remained stayed.

The law regarding *Martinez* then began to evolve. A panel of the Ninth Circuit concluded that when a federal habeas claim of sentencing ineffectiveness is predicated upon substantial new evidence not presented to the state courts (exactly as in Schad's case), it is procedurally defaulted, but subject to the *Martinez* exception. *Dickens v. Ryan*, 688 F.3d 1054, 1070 (9th Cir. 2012). The Ninth Circuit Court of Appeals then granted *en banc* review in *Dickens*, while the mandate in Schad's case remained stayed. Schad promptly sought a continued stay of mandate pending the *en banc* decision in *Dickens*,[2] after which Schad filed (at the

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[2]Schad immediately notified the Arizona Supreme Court that he had requested a continuation of the mandate stay in light of the en banc grant in *Dickens*. See Exhibit 1, email correspondence

panel's request) a request for reconsideration of his motion for a *Martinez* remand – a motion that was filed many months earlier, before Schad even filed his certiorari petition.

Though fully aware that the court of appeals had not issued any mandate and that Schad's initial federal habeas proceedings were thus not final, the state of Arizona pressed forward to have Schad executed.

The Arizona Supreme Court – also knowing that the court of appeals had not issued a mandate marking the conclusion of federal habeas proceedings – ordered Schad executed on March 6, 2013. Indeed, when it ordered Schad's execution, the Arizona Supreme Court was well aware that any interest in finality of its judgment had not yet attached. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)(state's interest in finality becomes compelling once court of appeals issues its mandate).

With *Martinez* having been decided during the pendency of Schad's initial habeas proceedings, the court of appeals reconsidered its denial of the pre-certiorari *Martinez* motion and its prior panel opinion. The appellate court faithfully considered the various contentions now made by petitioner and rejected them.

The court appropriately noted that the application of *Martinez* under similar circumstances is being considered by the *en banc* court in *Dickens v. Ryan*, No. 08-99017 and by a panel in *Detrich v. Ryan*, No. 08-99001 and that "Schad's case raises the same issues our court is considering *en banc*." *Schad*, slip op. at 2.

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between Kelley Henry (counsel for Schad) and Donna Hallam (Staff Attorney for the Arizona Supreme Court)(Hallam will inform the Justices of the motion).

The panel carefully balanced the stay equities to determine whether a *Martinez* remand on Schad's initial habeas proceedings is warranted, concluding that the circumstances here are exceptional, even **assuming** a *Martinez* remand based on a *Martinez* motion made before certiorari was filed requires such a showing. *Id.*, slip op. at 3-11.[3]

The court carefully looked at the facts of Schad's case, noting that the change in the legal landscape wrought by *Martinez* and the appellate court's *en banc* review of an identical issue are exceptional. In so doing, the court noted that the aggravation in Schad's case is weak, and that Schad's unpresented evidence of mental illness is very significant, showing that because of mental illness, Schad "did not bear the same level of responsibility for the crime as would someone with normal mental functioning." *Id.*, slip op. at 9-10.

The court of appeals also held – in complete accord with the decisions of the Fourth, Fifth, and Tenth Circuit (*See* p. 2, *supra*) – that Schad's ineffectiveness claim is a new claim that is procedurally defaulted because it is based upon new evidence that was never considered by the state courts, and that it is therefore subject to *Martinez*. *Schad*, slip op. at 11-14.

The court of appeals concluded that *Martinez* applies with full force to Schad's claim because it is a new claim, and rejected the state's argument that *Cullen v. Pinholster*, 563 U.S. ___ (2011) applies to claims never before adjudicated

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[3]Schad does not concede that such a showing is required.

in state court due to the ineffectiveness of post-conviction counsel. *Schad*, slip op. at 13 n. 3.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. Petitioner Misleads The Court By Claiming That The State Court Denied On The Merits Ed Schad's Claim That Counsel Was Ineffective For Failing To Present Mitigating Evidence Of His Serious Mental Disorders

Before getting to the many other reasons why certiorari is not warranted, Ed Schad is compelled to point out that, as to question presented 2, certiorari is not warranted based solely upon the wording of the question itself, because it contains clear misstatement of fact. While claiming that the lower court "erred" in its application of law (which itself provides no grounds for certiorari), petitioner claims that Schad's mental-health mitigation claim is a claim "that the state court had denied on the merits." Petition, p. I, Question Presented 2. That is simply not true, and petitioner knows it's not true.

Indeed, the sentencing ineffectiveness claim presented by Schad in federal habeas is premised upon the significant mitigating evidence of serious mental illness supported by, *inter alia*, extensive declarations of Yale psychologist Charles Sanislow, Ph.D. (Exhibit 2), and Leslie Leibowitz (Exhibit 3). During initial post-conviction proceedings, counsel presented no mental-health mitigating evidence to support *any* constitutional claim. Given this reality, petitioner himself stated below that Schad's federal habeas claim premised on such evidence was not exhausted (and thus defaulted) because Sanislow's compelling mitigating narrative "places the claim in a significantly different evidentiary posture in federal court, *violating the*

exhaustion requirement." R. 116, p. 4 (State's Opposition To Motion To Expand Record)(emphasis supplied).

For petitioner to now come to this Court claiming that Schad's federal habeas claim was adjudicated on the merits by the state courts is thus disingenuous at best and false, at worst. Schad's claim could not have been adjudicated on the merits where, as even petitioner agrees, the state court never "heard and evaluated the evidence" supporting the claim. *Johnson v. Williams*, 568 U.S. ___, 133 S.Ct. 1088, 1097 (2013) (setting forth standards for an adjudication on the merits). Regardless, because question 2 is based on the unquestionably false premise that Schad's mental-health mitigation claim presented in federal habeas was decided by the state courts, the petition must be denied on that basis alone, for the question posed by petitioner is not actually presented by this case.

II. The Petition Seeks Review Of An Interlocutory Order

Certiorari should also be denied because petitioner "seeks our intervention before the litigation below has come to a final judgment." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993)(Scalia, J., respecting denial of petition for writ of certiorari). As Justice Scalia emphasized in *VMI*: "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.* (*citing cases*). This makes eminent sense, because additional lower court proceedings ordered by the court of appeals will clarify both the facts and the law of the case, and may even moot any number of the issues presented by a petition such as this. This Court ought not address issues except when necessary,

and when based upon a complete record. *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936)(Brandeis, J., concurring).

Given the uncertainty about the actual contours of a yet-to-be-entered final judgment in this matter, it is thus prudent for the Court to deny certiorari. Only upon entry of a final lower court judgment definitively resolving the case should review be contemplated, if at all. *See e.g., Wrotten v. New York*, 560 U.S. ___ (2010)(Sotomayor, J., respecting denial of certiorari); *DTD Enterprises, Inc. v. Wells*, 558 U.S. 964 (2009) (Kennedy, J., respecting denial of certiorari); *Columbia Union College v. Clark*, 527 U.S. 1013 (1999)(Thomas, J., dissenting)(petition for writ of certiorari to court of appeals presumably denied given "interlocutory posture" of the case); *Jefferson v. City of Tarrant*, 522 U.S. 75, 84 (1997)(dismissing petition for writ of certiorari as improvidently granted where state court had not yet "effectively determined the entire litigation."); *VMI, supra* (Scalia, J.).

III. The Issues Presented Are Factbound, If Not Factually Unique

As an institutional matter, this Court is not an appropriate forum for resolving factual disputes or otherwise resolving legal issues posed in factually distinct cases, for this Court's certiorari jurisdiction is more commonly reserved for exposition of legal principles of general applicability. These considerations also counsel denial of the petition.

The procedural posture of this case is unique. During the course of his initial habeas proceedings, this Court decided *Martinez v. Ryan*, 566 U.S. ___ (2012). In the course of those proceedings, Ed Schad promptly requested application of

Martinez, which was summarily denied. With the appellate mandate stayed, Schad then petitioned for certiorari (which was denied), and he requested and received a continued stay of the mandate, a stay which petitioner never opposed. With that stay of mandate in effect, the court of appeals granted rehearing in another case on the very issue presented in Schad's case (*Dickens v. Ryan*, 704 F.3d 816 (9th Cir. 2013)(en banc), and then Schad promptly requested relief and reconsideration of his *Martinez* motion, which was granted.

Given this unique fact pattern as well as the fact-bound questions presented by petitioner, certiorari should be denied. First, while petitioner complains about the meaning of *Bell v. Thompson*, 545 U.S. 794 (2005), it is apparent that any decision by this Court would only apply to this case. In reality, how many other cases will involve this Court issuing an intervening decision during the pendency of initial federal proceedings, a party promptly seeking its application only to be denied summarily, followed by an *en banc* grant on the same issue, and a request for reconsideration of the intervening decision which is granted in the interests of justice while the mandate has remained stayed – a stay that was granted without objection by the opposing party? To pose the question is to answer it. The unique, factbound nature of this case makes question 1 not worthy of review.[4]

The same thing can be said of question 2. While containing the factual misstatement noted *supra*, petitioner also premises this question upon specific

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[4]Schad has been unable to identify any factually similar situation in any case in the 8 years since *Thompson*, which confirms the impropriety of certiorari here.

factual assertions relating to the decision of the district court. Those considerations, however, are not even relevant to the disposition of this case, because a district court doesn't have a final say on the law. The question also omits at least one other critical fact that must be considered when addressing the propriety of the court of appeals' order, *viz.*, petitioner's own argument in the lower courts emphasizing that Schad's claim was *not* adjudicated on the merits, which, as a factual matter, estops petitioner from making the argument he now presents to this Court.[5] On review, this Court would thus have to sort through the thicket of the facts and consider *all* the facts, not just the facts selected by petitioner to include in his question presented, and would have to decide non-certworthy issues not specifically presented by the petition such as estoppel. All told, therefore, the factbound nature of question 2 (and the facts that it doesn't mention) makes it unworthy of review. *See Fry v. Pliler*, 551 U.S. 112 (2007)(refusing to consider factbound questions).

Question 3 suffers the same fate. Petitioner is asking this Court to review the court of appeals' factbound decision to remand for consideration of Schad's

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[5] In the body of the petition – not in the questions presented – petitioner makes assertions that Schad's claim is not subject to procedural default, because procedural default can be "deliberately waived" and somehow there was a deliberate waiver in this case. Any such issue, however, is not fairly encompassed within question 2, and therefore is simply not before the Court. *Wood v. Allen*, 558 U.S. 290, 304 (2010); U.S. Sup.Ct. R. 14.1(a). Moreover, on certiorari, this Court is not in the business of parsing the facts of a district court and appellate court record to make an extremely factbound assessment regarding the existence of waiver. Nor is such an issue independently certworthy. *See Trest v. Cain*, 522 U.S. 87 (1997).

ineffectiveness claim in light of all the circumstances. While complaining that the district court is not a proper forum for resolving Schad's *Martinez* issue, petitioner's question also overlooks the very foundation of the court of appeals' order, which mandates the district court to assess the effectiveness of post-conviction counsel under *Martinez*. This is an issue that has not been decided by any court and thus requires additional process. *Cf. Martinez*, 566 U.S. at ___ (slip op. at 15)(remanding for further proceedings where lower courts had not yet applied *Martinez* rule). Because such an assessment requires an evaluation of the facts, *only* the district court is in a position to make that assessment in the first instance, and petitioner's complaint about the remand thus rings hollow.

Petitioner thus lacks any reasonable basis to assert that the case ought not be remanded to the district court under *Martinez*, and where this Court's intervention on such a matter would merely require a factbound application of law to the facts, certiorari is simply not warranted.

IV. There Is No Split Among The Circuits That Needs To Be Resolved, Especially Where The Lower Courts Have Not Even Weighed In On The Issues Presented

Petitioner also fails to identify any split among the circuits requiring this Court's intervention. With question 1 requesting a factbound ruling based upon unique facts, it is not surprising that there is no split of authority concerning the application of *Thompson* under the circumstances presented here. Schad's case is unique in this respect, with *Thompson* never having been applied in any situation analogous to the situation here.

Similarly, as to question 2, other than the court of appeals below, the lower courts have simply not spoken about *Martinez* s applicability to ineffectiveness claims such as Schad's, or whether *Pinholster* categorically prohibits such application, as petitioner would contend. In one case, the Sixth Circuit posed the question about the applicability of *Martinez* but never reached it. *Hanna v. Ishee*, 694 F.3d 596 (6th Cir. 2012). Apart from the court of appeals below, the issue thus remains undecided by the remaining courts of appeals, leaving this Court with very little to work with in the way of appellate discourse on the subject.

Absent a conflict (let alone a mature conflict) in the lower courts about the impact of *Martinez* upon *Pinholster*, review by this Court is premature, just as it is premature given the interlocutory nature of the court of appeals' order. *See* Section II, *supra*. The issue needs to percolate:

> [T]his is exactly the sort of issue that could benefit from further attention in the courts of appeals. We should not rush to answer a novel question about the application of a 1-year-old decision in the absence of a pronounced conflict among the circuits.

Spears v. United States, 555 U.S. 261, 270 (2009)(Roberts, J., dissenting). Under these circumstances, the Court should give the courts of appeals "time to address these precedents before adding new ones." *Id. See also California v. Carney*, 471 U.S. 386, 399-400 (1985)(Stevens, J., dissenting).

Likewise, question 3 regarding the propriety of a remand is not subject to any circuit split, notably because it is so factbound. It, too, is also not worthy of plenary review.

V. Petitioner Merely Seeks Error Correction,And The Court Of Appeals Properly Applied Governing Precedent

Finally, certiorari is not warranted because the petitioner seeks error correction, even as the lower court decision discloses no error worthy of this court's attention.

In granting relief, the court of appeals has applied the very principles of law articulated in *Bell v. Thompson*, 545 U.S. 794 (2005), *viz.* that before issuing its mandate, a court of appeals has inherent power to revise its mandate under extraordinary circumstances. Applying settled exhaustion and procedural default principles (including *Humphrey v. Cady*, 405 U.S. 504, 517 (1972), and *Coleman v. Thompson*, 501 U.S. 722 (1991)), the court of appeals has also concluded that Schad's ineffectiveness claim is unexhausted and procedurally defaulted. *Schad*, slip op. at 12-14. The court of appeals has taken cognizance of *Martinez* and concluded, as in *Martinez*, that given procedural default, Schad may be able to establish "cause." *Schad*, slip op. at 14-15. In doing so, the court of appeals has also fully acknowledged *Pinholster*, and the scope of its holding. *Schad*, slip op. at 13 n.3.

With the court of appeals having cited and applied all the appropriate principles governing the resolution of Schad's claims, petitioner's request for review boils down to a request for error correction. In fact, the petitioner's questions specifically query whether the court of appeals "order err[s]" in the application of law to the facts. *See* Petition, p. i (questions 2 & 3). Such queries, however, are

not certworthy. *See Kyles v. Whitley*, 514 U.S. 419, 458 (1995)(Scalia, J., dissenting).

Even so, there is no plain error warranting review, for the court of appeals has acted appropriately. *Thompson* acknowledges that a court of appeals has discretion to revise its opinion in extraordinary circumstances, having cited cases in which such revision has occurred in the interest of justice. *Thompson* does not say (as petitioner contends), that there is no discretion. For if that were true, this Court would have said so in *Thompson*, rather than issuing an advisory opinion about the "abuse of discretion" which occurred. The court of appeals has carefully considered all the facts, concluded that they are extraordinary (for they are, *See* p. 1-6, *supra*), and appropriately revised its mandate in the interests of justice in this capital case.

In doing so, the court of appeals acknowledges the rule of *Martinez*, which allows the ineffectiveness of post-conviction counsel to provide "cause" for the default of an ineffectiveness claim. And it has fairly and properly applied *Martinez*, which is predicated on the notion that a federal habeas petitioner is entitled to one full and fair consideration of his ineffectiveness claim. If such consideration was not provided in state court because of the ineffectiveness of post-conviction counsel, it *must* be provided in federal court, lest the bedrock right to counsel – the very "foundation for our adversary system" (*Martinez*, 566 U.S. at ___ (slip op. at 9)) – be rendered a nullity. Where no court has ever decided Schad's ineffectiveness claim by considering Dr. Sanislow's and Dr. Leibowitz's substantive declarations, *Martinez* allows Schad to have them heard in federal court, where post-conviction

counsel was ineffective. This conclusion is not only not patently wrong but it is eminently reasonable and correct, and thus certiorari is not warranted.[6]

Finally, where a remand for application of this Court's intervening decision in *Martinez* has occurred in any number of similar situations,[7] it can hardly be said that the court of appeals did anything improper in issuing a similar remand order here, such that this Court is compelled to intervene. The court of appeals' decision is perfectly in line with the decisions in these many other cases. The court of appeals has also noted that the district court's prior consideration of Schad's claim was "fundamentally flawed" in that it mistakenly believed that Schad's new evidence was "merely cumulative" and mistakenly failed to realize that his claim was a new claim and defaulted. *Schad*, slip op. at 14 n.4. The court of appeals' remand is likewise not erroneous, for the court of appeals' assessment of the situation is factually accurate, and giving a district court a chance to reconsider a prior decision once told of its legal error is clearly permissible. *Cone v. Bell*, 556 U.S. 449, 475 & n. 19 (2009)(remanding for proper consideration of habeas claim).

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[6] 28 U.S.C. § 2254(d) does not prohibit relief under *Martinez*, because the claim involving such evidence was never "adjudicated on the merits." Nor does 28 U.S.C. § 2254(e) prohibit relief where the failure to develop such evidence was the fault of ineffective post-conviction counsel, not Schad.

[7] *See e.g.*, *Hairston v. Blades*, No. 11-99012 (9th Cir., Feb. 25, 2013); *Rodriguez v. Padula*, No. 12-6392, 2012 U.S. App. Lexis 20405 (4th Cir, Sept. 28, 2012); *Henderson v. Colson*, No. 06-02050 (6th Cir. July 2, 2012); *Creech v. Hardison*, No. 10-99015 (9th Cir., June 20, 2012); *Cantu v. Thaler*, 682 F.3d 1053 (5th Cir. June 1, 2012); *Middlebrooks v. Colson*, No. 05-5904 (6th Cir., May 17, 2012); *Lindsey v. Cain*, No. 11-30997, 2012 U.S. App. Lexis 7953 (5th Cir., Apr. 19, 2012).

All told, therefore, while petitioner's request for error correction is not well-taken given the nature of this Court's certiorari jurisdiction, there is no patent error even requiring "correction." The petition must be denied.

CONCLUSION

This Court ought not wade into reviewing an interlocutory, factbound order that is not subject of any circuit conflict, and seeks correction of errors that are non-existent, and certainly not patent. This Court should thus deny the petition for writ of certiorari.

Respectfully submitted,

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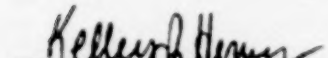

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REPLY BRIEF

RECORD
AND
BRIEFS

MAY 20 2013

No. 12-1084

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,

Petitioner,

vs.

EDWARD HAROLD SCHAD,

Respondent.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S ARGUMENTS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING WAS DENIED ON THE MERITS BY THE STATE COURT.

Schad contends that Petitioner is misleading the court by stating that the state PCR court denied on the merits his claim of ineffective assistance of counsel (IAC) at sentencing. The record speaks for itself, and clearly shows that this IAC claim was denied on the merits by the state court. The fact that Schad introduced new evidence in support of his claim in state court did not make it a different claim. Thus, whether this case is controlled by *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), or *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), is squarely before this Court.

First, the district court stated: "The trial court denied Petitioner's claim that counsel was ineffective at sentencing [citing M.E. 6/21/96]" and that "the trial court's denial of Petitioner's sentencing-stage IAC claim was not an unreasonable application of clearly established federal law as set forth in *Strickland*." (Pet. App. at G-100.) It additionally found that Schad had not been diligent in developing additional factual information that was not presented to the state court. (*Id.* at G-91.) It did not find, or even discuss, procedural default. (*Id.* at G-80 to G-100.)

Second, the Ninth Circuit panel's own third amended opinion stated: "The state habeas court ruled that Schad's claim of ineffective assistance of counsel

at sentencing *lacked merit* because he was unable to present any significant mitigating evidence." (*Id.* at F-29.)

Third, the dissenting opinion from the denial of rehearing authored by Judge Tallman found that *Pinholster* "bars Schad from introducing new mitigating evidence in federal court *for a claim that he has previously exhausted before the Arizona courts.*" (*Id.* at D-5, emphasis added.)

Schad attempts to avoid the state court merits ruling, and hence the application of *Pinholster*, by arguing, as the panel majority found, that the additional mitigating evidence he first offered in federal court spawned a "new" IAC claim that is different from the one decided by the state court. From this, the "new" IAC claim is procedurally defaulted (even though the district court found no procedural default) for not having been presented and decided by the state court, opening the door to the application of *Martinez* to excuse the newly-found procedural default. (*Id.* at A-13.) This Court should take review to reject this unwarranted extension of *Martinez*, which would make *Pinholster* a virtual dead letter.

The dissenting opinion authored by Judge Tallman rejected Schad's and the panel majority's end run around *Pinholster*: "As in *Pinholster*, the legal basis for Schad's ineffective assistance of counsel claim is the same as it was before the initial post-conviction state court, *and merely improving the evidentiary support does not provide a basis for a federal court to overturn a state court's reasoned opinion.*" (*Id.* at D-6, emphasis added.) It later states: "Merely bolstering the

evidentiary basis for the claim does not transform Schad's previously adjudicated claim into a novel claim not bound by *Pinholster* or the state court record." (*Id.* at D-7.) Judge Tallman's dissent concludes: "The majority's order perversely incentivizes prisoners and their counsel to locate additional, even cumulative, evidence during federal habeas proceedings. Applying the majority's logic, this evidence may then be found to have fundamentally altered and transformed claims that *were adjudicated during state post-conviction relief proceedings* into new claims not bound by *Pinholster* or the state court record." (*Id.* at D-11.)

Thus, what is unreasonable is not Petitioner's assertion that the IAC-sentencing claim was denied on the merits by the state court, but rather the Ninth Circuit panel majority's assertion that the new habeas evidence created a new IAC-sentencing claim that was not adjudicated on the merits, thereby evading *Pinholster*. This Court should take review to decide the important federal question, squarely presented by this case, of whether *Pinholster* applies in this very common procedural situation. The panel majority failed to follow this Court's precedent and honor its prior certiorari rulings because it "has now completely reversed its prior ruling and has again remanded the case to the Arizona district court for a second time, directing it to consider the 'new' *Martinez* claim (which the majority now characterizes as procedurally defaulted), while backhandedly dispatching *Pinholster* in a mere footnote." (Tallman, J., dissenting, Pet. App. at D-5.)

II. THE NINTH CIRCUIT CANNOT AVOID THIS COURT'S REVIEW BY ISSUING AN "INTERLOCUTORY" ORDER THAT IS ACTUALLY JUST A RECONSIDERATION OF AN ISSUE IT ALREADY REJECTED BEFORE THIS COURT'S CERTIORARI REVIEW OF THE QUESTION.

Schad asserts that the Ninth Circuit panel majority can avoid this Court's plenary review by issuing an "interlocutory" order under *Martinez*. The Ninth Circuit should not have stayed the mandate to issue this "interlocutory" order, which is actually a reconsideration of an issue it summarily rejected before this Court's certiorari review. This Court should take review because of the substantial delay the *Martinez* remand would cause in this already long-litigated capital case.

First, as stated in Judge Tallman's dissenting opinion: "Our mandate should have issued automatically following the Supreme Court's denial of Schad's petition for certiorari which rejected his Martinez argument." (Pet. App. at D-10.) *Bell v. Thompson*, 545 U.S. 794 (2005), addressed whether "inaction by the Fourth Circuit was sufficient to stay a mandate regarding an execution." *Id.* at 804. The Court found that the state had reasonably assumed that the federal habeas court proceedings had terminated after this Court denied Thompson's petition for rehearing to this Court: "While it might have been prudent for the State to verify that the mandate had issued, it is understandable that it proceeded to schedule an execution date." *Id.* This Court further

explained: "The parties' assumption that Thompson's habeas proceedings were complete was all the more reasonable because the Court of Appeals' delay in issuing its mandate took place *after we had denied certiorari*. As a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation. While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare." *Id.* at 805-806.

Petitioner reasonably assumed that the Ninth Circuit would not grant relief on a legal claim it previously summarily rejected, and that was the basis for Schad's petition for writ of certiorari and petition for rehearing in this Court. There was no exceptional circumstance to authorize staying the mandate. *See Stokley v. Ryan*, 705 F.3d 401, 403 (9th Cir. 2012); *Adamson v. Lewis*, 955 F.2d 614, 619-20 (9th Cir. 1992) (*en banc*) (no exceptional circumstances where subsequent Supreme Court authority did not require a change in result). *Martinez* was considered, and summarily rejected by the Ninth Circuit, before this Court considered the very same issue on certiorari review. Thus, there was no intervening Supreme Court authority that would have required a change in result.

The panel majority denied Schad's motion to continue stay of the mandate pending *en banc* proceedings in *Dickens v. Ryan*, Ninth Circuit No. 08-99017. (Pet. App. at A-1.) However, its *Martinez* remand order noted the pending proceedings in *Dickens* and in *Detrich v. Ryan*, Ninth Circuit No. 08-99001. (*Id.* at A-2.) But the panel majority did not

stay the mandate pending resolution of those cases, rather it remanded to the district court as though *Dickens* and *Detrich* had already been decided favorably for Schad. Moreover, there was no intervening Supreme Court authority to support a stay of the mandate and issuing the remand order.

Second, even if the order at issue was truly an "interlocutory" order, this Court has unquestioned jurisdiction to consider interlocutory orders of federal courts of appeal and other federal courts whose judgments are reviewable pursuant to 28 U.S.C. § 1254(1). E. GRESSMAN ET AL., SUPREME COURT PRACTICE (Ninth Ed. 2007), at 280. In the recent past, this Court has taken certiorari review of non-final orders from the Ninth Circuit. *See Ryan v. Gonzales*, 133 S. Ct. 696, 700-701 (2013) (reviewing writ of mandamus staying habeas proceeding in district court pending a competency determination); *Schriro v. Landrigan*, 550 U.S. 465, 468-469 (2007) (reviewing remand to district court after determining district court abused its discretion in denying an evidentiary hearing).

Furthermore, as noted by Judge Callahan's dissent, Schad is "a twice-convicted murderer who has already had the benefit of 33 years of legal process. (Pet. App. at D-13.) This Court should grant review to prevent "likely giving Schad another six years to live." (*Id.* at D-12 to D-13.)

III. THE ISSUES CONCERN RECURRING AND IMPORTANT FEDERAL LEGAL QUESTIONS THAT CAN BE DECIDED ON A LIMITED RECORD, NOT "FACT-BOUND" ISSUES.

Schad's attempt to characterize the issues presented as "fact-bound" ignores the questions themselves and the limited factual record necessary to determine them. The Ninth Circuit "decided [] important federal question[s] in a way that conflicts with relevant decisions of this Court." U.S. SUP. CT. R. 10. Taking review would not require this Court to "sort through the thicket of the facts and consider resolve *all* the facts." (BIO, at 10, emphasis in original.)

First, whether the Ninth Circuit failed to follow *Thompson* by failing to issue the mandate after this Court's denial of certiorari review on the very same issue is a clear legal question of significant interest to the federal judiciary, one left open by *Thompson*. The procedural history of the case has been thoroughly set forth by both parties, and no further facts need be found. The Ninth Circuit has been presented with the increasingly common practice by capital prisoners of seeking to stay the mandate after this Court denies certiorari review. *See Stokley*, 705 F.3d at 402-403.

Second, the underlying issue, whether this case is controlled by *Pinholster* or *Martinez* is a quintessential legal issue, that turns on whether the state court decided the IAC-sentencing claim on the merits, or whether presentation of new evidence in federal habeas creates a "new" IAC-sentencing that is not subject to *Pinholster*. This issue requires only analysis of these two opinions, and a very limited procedural

record that will determine which opinion controls this case. In Schad's previous petition for a writ of certiorari, he argued as the question presented: "Where a general claim of ineffective assistance of counsel is presented to the state court, but is not supported by facts either because of a) ineffective assistance of review counsel, *see Martinez* [citation omitted]; ., is the federal habeas court's review of the claim limited to the record presented to the state court under *Cullen v. Pinholster*, [citation omitted]?" See Petition for Writ of Certiorari in *Schad v. Ryan*, Supreme Court No. 12-5534, at i.

Third, even if this Court should somehow determine that this case is not controlled by *Pinholster*, the *Martinez* issue is not itself factually complicated. The district court, even assuming Schad had been diligent in attempting to present a factual basis in state court, analyzed the newly-proffered evidence in some detail, and found no deficient performance or prejudice. (Pet. App. at G-91 to G-100.) Judge Graber's dissent found no prejudice resulting from any deficient performance by counsel at sentencing. (*Id.* at A-17.) Judge Tallman's dissent similarly found no substantial ineffective assistance claim under *Martinez*. (*Id.* at D-9 and D-10.)

In support of his "new claim" only the declarations by Dr. Charles Sanislow and Dr. Leslie Leibowitz, which he has attached as exhibits. (BIO, Exs. 2 & 3.) Contrary to what Schad asserts (BIO, at 14), the district court considered and extensively analyzed these declarations. (Pet. App. at G-97 to G-99.) However, the panel majority found this analysis

"fundamentally flawed as a result of its mistaken belief that Schad's new evidence was merely cumulative. (*Id.* at A-13 fn.4.) Thus, the new evidence has been analyzed by the lower courts, and this Court can determine if there was any prejudice from any deficient performance in counsel's failure to present the declarations of Drs. Sanislow and Leibowitz at sentencing. *See Bobby v. Van Hook*, 558 U.S. 4, 12-13 (2009); *Pinholster*, 131 S. Ct. at 1409; *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007).

The lack of prejudice is particularly clear because of the two aggravating factors. As noted in Judge Callahan's dissent, "Schad has previously been convicted of murder for the strangulation death of another man, Clare Mortensen, in Utah." (Pet. App. at D-12.) This Court has recognized that a defendant having committed another murder is "the most powerful imaginable aggravating evidence." *Wong v. Belmontes*, 558 U.S. 15, 28 (2009).

IV. THE PANEL MAJORITY'S ORDER CONFLICTS WITH OPINIONS FROM THIS COURT, AND THIS CASE REFLECTS THE SUBSTANTIAL UNCERTAINTY THE LOWER COURTS FACE IN RECONCILING *PINHOLSTER* AND *MARTINEZ*.

Schad contends that review should be denied because there are no circuit court splits on the issues presented. (BIO, at 11-12.) First, as discussed above, there is uncertainty in the Ninth Circuit itself over what to do with capital prisoner's post-certiorari motions to stay the mandate. Second, there is great uncertainty and conflict in the lower courts on how to

reconcile *Pinholster* and *Martinez*. Third, there is great uncertainty in the lower courts regarding when remand is appropriate under *Martinez*.

The main issue here is the panel majority's treatment of *Pinholster* and *Martinez*. Petitioner's request for review is primarily based on conflict between the panel majority's order and *this Court's authority*. *See* U.S. SUP. CT. R. 10. This Court does not need the issue to "percolate" so that it can understand what it meant in *Pinholster* and *Martinez*.

There is undoubtedly substantial uncertainty and conflict in the lower federal courts of how to reconcile *Pinholster* and *Martinez*. As Schad stated in his previous certiorari petition, the "tension" between *Pinholster* (and other cases) and *Martinez* "Has Led to Inconsisent and Inequitable Decisions in the Lower Courts. This Court Should Grant Certiorari to Resolve These Conflicts and Provide Guidance to the Lower Courts on a Recurring Issue." (Petition for a Writ of Certiorari in *Schad v. Ryan*, Supreme Court No. 2254, at 14.)

Confusion about how to apply *Martinez* is indicated by another Ninth Circuit opinion discussing another Arizona capital prisoner's attempt to expand the narrow rule of *Martinez*:

> Lopez argues that it is but a small expansion of *Martinez* to hold that the "narrow exception" in *Martinez* necessarily applies not only to PCR counsel's ineffective failure to raise a claim (the subject of procedural default) but also to PCR counsel's ineffective failure to

> develop the *factual basis of a claim (the subject of § 2254(e)(2)*. We need not decide whether Lopez is correct, though we do note tension between his theory and the Supreme Court's jurisprudence in this area, see, e.g., *Cullen v. Pinholster* [citation omitted]. . *Given the difference between procedural default and § 2254(e)(2), and the potentially significant legal difference between those doctrines, this factor does not weigh in favor of reopening Lopez's case.*

Lopez v. Ryan, 678 F.3d 1131, 1137 (9th Cir. 2012) (emphasis added).

V. THIS CASE INVOLVES MORE THAN ERROR CORRECTION, BUT RATHER THE PANEL MAJORITY'S FAILURE TO FOLLOW THIS COURT'S OPINIONS AND CERTIORARI RULINGS.

This case is not simply about error correction, but whether the Ninth Circuit panel majority has shown the appropriate respect for this Court's precedent previous certiorari rulings in this case. As stated by Judge Tallman's dissent: "The majority's stay of execution and remand order in *Schad* openly defies the Supreme Court's directive in this very case and takes our habeas jurisprudence down a road that has already been rejected." (Pet. App. at D-3.)

The panel majority evaded this Court's denial of certiorari review by reversing itself on an issue it previously summarily rejected on the merits, when

there was no intervening opinion from this Court constituting an extraordinary circumstance that justified staying the mandate and granting relief. This Court granted review and afforded relief in *Cavazos v. Smith*, 132 S. Ct. 2 (2011), saying:

> The decision below cannot be allowed to stand. This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention. [citations omitted]. Its refusal to do so necessitates this Court's action today.

132 S. Ct. at 7-8.

Similarly, the panel majority here refused to follow the clear dictates of *Pinholster*, despite this Court's previous grant of certiorari and reversal to reconsider the same IAC issue in light of *Pinholster*. Judge Tallman's dissent says the panel majority "order needlessly adds years of additional delay in carrying out the sentence imposed on a twice convicted murderer by willfully ignoring the Supreme Court's express guidance to apply *Pinholster* here and by refusing to interpret *Martinez*, 132 S. Ct. at 1315, narrowly as the Court has commanded." (Pet. App. at D-3.) The dissent found Pinholster and Schad's claims factually indistinguishable. (*Id.* at D-5 to D-6.) It comments: "The majority attempts to circumvent the Supreme Court's holding in *Pinholster* by conjuring up

a 'new' *Strickland* claim, based on additional evidence identified for the first time in federal habeas proceedings." (*Id.*) It finds the application of *Martinez* "misguided and without basis," noting "there is no procedural defaulted claim, and no need to establish either cause or prejudice," and that "the ephemeral default declared is only in the mind of the panel majority." (*Id.* at D-9.) Judge Tallman's dissent concludes: "We should have reheard this case en banc and corrected the unsupported order before the Supreme Court, for a second time, admonishes us for not applying *Pinholster*." (*Id.* at D-11.)

CONCLUSION

Petitioner requests this Court to grant certiorari review, vacate the Ninth Circuit's opinion order of February 26, 2013, and order the Ninth Circuit to issue its mandate based on the third amended opinion filed November 10, 2011.

Respectfully submitted,

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